TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 109.

THE ATLANTIC TRUST COMPANY, PETITIONER,

vs.

EDGAR C. CHAPMAN, RECEIVER OF THE WOODBRIDGE CANAL AND IRRIGATION COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR CERTIORARI FILED SEPTEMBER 20, 1907.
CERTIORARI AND RETURN FILED NOVEMBER 25, 1907.

(20,378.)

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a No. 1142.

United States Circuit Court of Appeals for the Ninth Circuit.

ATLANTIC TRUST COMPANY (a Corporation), Appellant,

vs.

E. C. CHAPMAN, Receiver of the Woodbridge Canal and Irrigation Company (a Corporation), P. A. BUELL & Co., EATON, NEWELL & BUCKLEY, LOUIS EPSTEIN & Co., FRESNO NATIONAL BANK, STOCKTON LUMBER Co., KUTNER, GOLDSTEIN & Co., BANK OF CENTRAL CALIFORNIA, J. J. SWAIN, H. BENTLY, FRANCIS COGSWELL and STANLEY W. DEXTER, Appellees.

Transcript of Record.

Upon Appeal from the United States Circuit Court for the Northern District of California.

1 In the United States Circuit Court, Ninth Judicial Circuit, Northern District of California.

THE ATLANTIC TRUST COMPANY (a Corporation), as Trustee of the Trusts Created by the Mortgage in this Complaint Described, Plaintiff,

vs.

THE WOODBRIDGE CANAL AND IRRIGATION COMPANY (a Corporation), Defendant.

Bill of Complaint.

To the Justices of the Circuit Court of the United States, for the Northern District of California:

The Atlantic Trust Company, of the city of New York, and a citizen of the State of New York, brings this its bill against the Woodbridge Canal and Irrigation Company, of San Francisco, and a citizen of the State of California, and thereupon your orator complains and says:

I.

That at all the times in this complaint mentioned the plaintiff, the Atlantic Trust Company, was and now is a corporation, organized and existing under and by virtue of the laws of the State of New York, having its principal place of business in the city and county of New York, in said State, and being formed and in-

2 corporated for the purpose and with the express powers of accepting, holding and managing trusts and trust properties.

That at all of said times the Woodbridge Canal and Irrigation Company was and now is a corporation, duly organized and exist-

ing under and by virtue of the laws of the State of California, having its principal place of business in the city and county of San Francisco, in said State, and was formed for the purpose and with the powers of owning and operating an irrigating canal in the county of San Joaquin, in said State of California.

That said defendant is a citizen and resident of the Northern Judicial District of the State of California, and that this plaintiff is a citizen and resident of the Southern Judicial District of the State of New York.

II.

That heretofore, to wit, on or about the 17th day of July, 1891, at said city and county of San Francisco, the said Woodbridge Canal and Irrigation Company made and executed one hundred (100) bonds, numbered from one (1) to one hundred (100), both numbers inclusive, each of which said bonds was in the words and figures following, to wit:

3 "UNITED STATES OF AMERICA,

No. ——, *State of California,* $1000.

First Mortgage Convertible Gold Bond of the Woodbridge Canal and Irrigation Company.

The Woodbridge Canal and Irrigation Company, a corporation duly organized under the laws of the State of California, acknowledges itself indebted to the bearer, or to the registered owner thereof, in the sum of one thousand dollars, which it promises to pay in the gold coin of the United States of America, of the present weight and fineness, on the first day of September, in the year nineteen hundred and one, at the office of the Atlantic Trust Company, in the City of New York, with interest thereon, at the rate of six per centum per annum, payable semi-annually, at the same place, upon presentation and surrender of the coupons hereto annexed, on the first day of March and September in each year, as they respectively become payable, so long as the principal remains unpaid.

This bond is one of a series of one hundred bonds, of similar amount, tenor and date, which are secured by a mortgage or deed of trust, bearing date this day, executed and delivered by the Woodbridge Canal and Irrigation Company to the Atlantic Trust
4 Company, as Trustee, conveying and assigning to the said Trustee all its corporate property and franchises now owned or hereafter acquired.

Any lawful holder of this bond, upon presenting the same at the office of the said Trustee, with all unmatured coupons attached thereto, may have the same registered in his own name, or that of any other person, in a book to be kept for that purpose, and such name, with the date of registry, shall be endorsed upon the bond by the said Trustee. From the date of such registry until, by a like

endorsement, it be again payable to bearer, such bond shall be transferable only by a written transfer thereof on the books of the Trustee, such transfer, and the date thereof, to be in like manner endorsed upon the bond, and while so registered, all payments becoming due thereon, either for principal or interest, shall be paid only to such registered owner or to his order. Successive registration and transfers to bearer may be made at the option of any lawful holder and owner of this bond.

It is expressly agreed that in case default shall be made in the payment of any semi-annual installment of interest on the day whereon the same shall fall due, as herein provided, or in the performance of certain covenants contained in said mortgage or deed of trust, and should default in any of such cases continue for the space of six months, then, and in either of such cases, the principal sum herein mentioned may, as in said mortgage or deed of trust provided, immediately become due and payable, anything herein contained to the contrary notwithstanding.

At any time between the first day of July, 1894, and the
5 first day of January, 1895, this bond, upon presentation and surrender thereof, to the said trustee, with all unmatured coupons attached, may, at the holder's option, be converted into the capital stock of this company at par, and the holder in such case shall be entitled to receive in payment of this bond one thousand shares of said capital stock of one dollar each, said stock being reserved in the treasury of the Company for that purpose.

This bond is also entitled to the benefits of the sinking fund in said mortgage or deed of trust provided for. The holder of this bond, by acceptance thereof, hereby waives any personal claim or demand against the stockholders of said Company, for the indebtedness incurred hereby.

This bond shall not become valid or obligatory until the certificate endorsed hereon shall have been duly signed by or in behalf of the said Atlantic Trust Company as Trustee.

In witness whereof, the Woodbridge Canal and Irrigation Company has caused these presents to be sealed with its corporate seal, and to be signed by its President, and attested by its Secretary, and the annexed coupons to be executed with the engraved signature of its Secretary, this 17th day of July, one thousand eight hundred and ninety-one.

[CORPORATE SEAL.] M. V. B. WATSON, *President.*

Attest: M. T. MOSES, *Secretary.*"

That each of said one hundred bonds was in the words
6 and figures above set forth, except that each was severally numbered as aforesaid, and that to each of said bonds were attached twenty (20) interest coupons, likewise executed by the Woodbridge Canal and Irrigation Company, each of which coupons was in the words and figures following, to wit:

"$30.

"On the first day of ——, 18—, the Woodbridge Canal and Irrigation Company will pay, at the office of the Atlantic Trust Company, in the City of New York, upon presentation and surrender of this coupon, to the bearer, or to the registered owner thereof, Thirty Dollars in United States gold coin for six months' interest then due on Bond No. ——.

M. T. MOSES, *Secretary.*"

That the blanks in said twenty (20) coupons attached to each bond were so filled out as to bear the number of the bond to which they were attached and to fix the date of payment of each coupon so that they should consecutively fall due, one on the first day of September and one on the first day of March of each year, beginning March 1st, 1892, and ending September 1st, 1901.

That each of said bonds when so executed, as aforesaid, bore endorsed thereon the following certificate, signed by the plaintiff:

"The Atlantic Trust Company hereby certifies that the within bond is one of the bonds issued under and in pursuance of
7 a certain mortgage or deed of trust, dated July 17th, 1891, and duly executed and delivered to said Company, as Trustee, by the Woodbridge Canal and Irrigation Company.

THE ATLANTIC TRUST COMPANY,
By W. H. MALE, *President.*"

That sixty-six (66) of said one hundred (100) bonds, with said relative coupons attached thereto, when so executed were, by the Woodbridge Canal and Irrigation Company, in exchange for money paid to it, sold and delivered to purchasers thereof prior to September, 1891.

That thirty-three (33) others of said bonds, prior to September, 1894, were by said Woodbridge Canal and Irrigation Company pledged to sundry creditors to secure debts due to them from said Woodbridge Canal and Irrigation Company.

That one (1) of said bonds has never been issued to any person but is still in the possession of the maker.

III.

That on or about the 17th day of July, 1891, and in order to secure the payment of the said sixty-six (66) bonds so sold and delivered and the thirty-three (33) bonds so pledged as aforesaid, the said Woodbridge Canal and Irrigation Company executed and delivered to this plaintiff, as trustee of the trusts thereby created, its certain indenture of mortgage, dated July 17, 1891, and executed in its corporate name by M. V. B. Watson, as its President, and by M. T. Moses, as its secretary, and to which mortgage was affixed its corporate seal.

8 That said mortgage was further, on or about the day on which it bears date, signed and executed by this plaintiff in acceptance of the trusts thereby created and imposed upon this plaintiff.

That said mortgage was duly acknowledged, so as to entitle it to be recorded, and it was recorded on the 10th day of August, 1891, in book "A" of Deeds, volume 74, page 361, in the county recorder's office of the county of San Joaquin, State of California.

That a copy of said mortgage is hereto attached, marked Exhibit "A," and is here referred to and made part of this complaint.

That in and by said mortgage the said Woodbridge Canal and Irrigation Company did mortgage to this plaintiff, as trustee, to secure the payment of the aforesaid bonds, the entire corporation property of said Woodbridge Canal and Irrigation Company, and all its lands, tenements, hereditaments, privileges, franchises, rights of way, flowage and riparian rights, easements and fixtures, then owned or thereafter to be acquired by it, and all its canals, flumes, headworks, gates, dams, and bridges, then constructed or to be thereafter constructed, extending from the point of diversion in the Mokelumne river, in the town of Woodbridge, in San Joaquin County aforesaid, in a westerly direction to Taison and New Hope, in said county, and in an easterly and southerly direction to the Calaveras river, with all other or branch canals that might be thereafter constructed within said territory south and west of the Mokelumne river; and all the estate, right, title and interest, claims and
9 demands, rights of way and other easements, whether at law or in equity, of the said canal company of, in and to the same; and also all buildings, fixtures, and personal property thereon or belonging to said canal company; and all receipts, incomes and profits which said company shall derive on account of any contract or agreement for the transfer of water rights as appurtenant to specified lands, excepting the annual rentals for the use of said water and interest on such contracts or agreements.

IV.

That on said 17th day of July, 1891, and at the time of the execution of the said bonds and the said mortgage, M. V. B. Watson was the president and M. T. Moses was the secretary of the said Woodbridge Canal and Irrigation Company, and as such president and secretary they were duly and fully authorized and empowered to execute the said bonds and mortgage, in the name and as the act of the said Woodbridge Canal and Irrigation Company, and to attach to said bonds and mortgage its corporate name, and to affix thereto its corporate seal, by resolution adopted by the vote of the holders of more than two-thirds of its capital stock at a meeting of its stockholders, duly and regularly called, notified, organized and held at the office of the Woodbridge Canal and Irrigation Company in the city and county of San Francisco, State of California, on the 11th day of July, 1891; and said president and secretary were further authorized to so execute said bonds and mortgage by resolution of the board of directors of the said Woodbridge Canal and Irrigation Company, duly passed and adopted.

10 V.

That since the execution of said mortgage the Woodbridge Canal and Irrigation Company has constructed and now owns an irrigating

canal in the county of San Joaquin, State of California, beginning at a dam in the Mokelumne river, in the town of Woodbridge, in the southeast quarter (¼) of section thirty-four (34), in township four (4), north of range six (6) east, Mount Diablo Base and Meridian, and running thence through said section thirty-four (34) and through and across portions of sections three (3), ten (10), eleven (11), fourteen (14), twenty-three (23), twenty-six (26), thirty-five (35), and thirty-six (36), in township three (3), north of range six (6) east, and through and across portions of sections one (1), twelve (12) and thirteen (13), in township two (2) north of range six (6) east; and also through and across section eighteen (18), in township (2) north of range seven (7) east, and following the line of division between subdivisions fifty-one (51) and sixty-one (61), of El Rancho Del Campo de Los Franceses; to the Calaveras river.

That the said Woodbridge Canal and Irrigation Company has likewise constructed and now owns and is operating sundry branch or lateral canals, diverging from said main canal above referred to, in a general westerly direction and irrigating the lands along their course.

That the Woodbridge Canal and Irrigation Company since the execution of said mortgage, has likewise acquired and now owns various other lands and properties, contracts and mortgages, in said county of San Joaquin and in the Northern District of the
11 State of California, a list of which properties is hereto appended, marked Exhibit "B," and is here referred to and made part of this complaint.

VI.

That no part of the principal sum mentioned in any of said bonds has ever been paid, and no part of the interest upon said bonds, which, by the terms thereof and of the coupons attached thereto, became due and payable on the first day of September, 1894, has ever been paid, nor has any money for the purpose of paying said September interest ever been paid or tendered to this plaintiff.

That on or about the first day of September, 1894, the holders of fifty-five (55) of said bonds, which had been so sold as aforesaid by the Woodbridge Canal and Irrigation Company, did present, at the office of this plaintiff, in the city of New York, the fifty-five (55) several coupons attached to said bonds and then on said day, falling due as aforesaid according to their terms, and did demand from this plaintiff payment thereof; that none of said coupons, nor any part of the money due thereon, was then paid by this plaintiff, or by any one; nor has any part of said money due on said coupons ever been paid by this plaintiff, or by any one; and plaintiff avers that thereby, on said first day of September, 1894, default was made by the said Woodbridge Canal and Irrigation Company in the payment of the said installment of interest upon said bonds.

That at a special meeting of the board of directors of the
12 Woodbridge Canal and Irrigation Company, held at its office in the city and county of San Francisco on the first day of

October, 1894, a resolution was unanimously adopted, declaring that said Woodbridge Canal and Irrigation Company was then unable, and would continue to be unable to pay at any time within the ensuing six months, that is to say, prior to April 1st, 1895, any of its indebtedness or any of the interest upon the said bonds; and further providing that it waived all conditions and provisions specified or provided in article fifth of the said mortgage, Exhibit "A" hereof, as conditions precedent to the enforcement of the lien created by said mortgage; and in and by the said resolution this plaintiff was authorized and requested to immediately commence this action for the foreclosure of the said mortgage, and to enforce the payment of the principal and interest of the said bonds.

That on the 2d day of October, 1894, and prior to the commencement of this action, the owners and holders of fifty-five (55) of the said bonds then outstanding did request, in writing, this plaintiff to commence this action, and did, in writing, express their election and option that the whole principal sum mentioned in each and all of the mortgage bonds then outstanding should forthwith become due and payable.

And plaintiff avers that, by reason of said default, resolution and notice of election and option, the entire principal sum of each and all of the said bonds did then, on the 2d day of October, 1894, mature and become payable.

13 VII.

That, as this plaintiff is informed and believes and so avers the fact to be, the property mortgaged to it and set forth in said mortgage and in Exhibit "B" hereof is insufficient to discharge the mortgage debt, as aforesaid, and cannot, in all probability, be sold for enough to pay the said ninety-nine (99) bonds, or said sixty-six (66) bonds, and the costs and expenses of this proceeding.

That the said canal is in the receipt of an income from the sale and rentals of water and must be operated as a whole, and kept in repair and under one management, or it will be entirely lost, and all the water rights and franchises possessed by the canal company will be forfeited from nonuser, and said franchises will be forfeited and annulled and the value of said canals destroyed in case the diversion and distribution of water thereby is suspended or discontinued.

That, therefore, the appointment of a receiver of said property, with power to control and manage the said canals and all of them, is necessary for the protection of said bondholders, by this Court in this proceeding.

Wherefore, plaintiff prays:

1. That this Honorable Court, upon the filing of this complaint, appoint some suitable person a receiver in this action, to take charge of the said mortgaged property and to maintain and operate said canals, pending this action and until final sale under any judgment of foreclosure herein, under the directions of this Court and
14 with such powers and authority as this Court, by its order, may from time to time confer upon him.

2. That this Court, by its decree, ascertain and determine what

and how many bonds of the series described in said mortgage have been lawfully issued and are now outstanding and unpaid, and declare that the entire principal sum of said bonds so found to be issued is now due and payable; and that the Court further, by said decree, fix and determine the amount of money due for principal and interest upon said bonds and enter judgment therefor against the said Woodbridge Canal and Irrigation Company in favor of this plaintiff, as trustee for said bondholders; and that this Court further, by its decree, fix and determine a suitable attorney's fee for payment of the services of the plaintiff's attorneys in this action, and further fix and determine the amount to be paid this plaintiff as compensation for its services as such trustee; and that this plaintiff may have judgment against the Woodbridge Canal and Irrigation Company for the amount found due for principal and interest on said bonds, and of said attorney's fee, trustee's commissions and costs and expenses of this action.

3. That further, by said decree, this Court shall order all of said franchises, canals, lands and other mortgaged premises and property to be sold by the marshal of the said Northern Judicial District of the State of California, at public auction, in accordance with law and with the course and practice of this Honorable Court; that the proceeds of said sale may be applied in the payment of
15 the expenses of sale and of the costs in this action, and of said trustee's commissions and counsel fees, and in the payment of the amount found due by this Honorable Court upon said outstanding bonds to the persons holding the same; that said defendants and each of them and all persons claiming or to claim by, through or under them, and each of them, subsequent to the execution of said mortgage, either as purchasers, encumbrancers or otherwise, may be barred and foreclosed of all right, title, claim or equity of redemption in the said mortgaged property and premises, and every part thereof; that the plaintiff or any other party to this suit, or any bondholder, may become a purchaser at such sale; that the marshal execute deeds to the purchaser or purchasers; and that said purchasers be let into the possession of the property bought by them, on production of such deed; and that such other and further relief may be by said decree given in the premises as to this Court shall seem meet and agreeable to equity.

And may it please your Honors to grant unto this plaintiff a writ of subpœna of the United States of America, issuing out of and under the seal of this Honorable Court, directed to the said defendant, the Woodbridge Canal and Irrigation Company, therein commanding it on a day certain therein to be named and under a certain penalty, to be and appear before this Honorable Court, then and there to answer (but not under oath) all and singular the premises and to stand to, perform and abide by the said order, direction and decree, as may be made against it in the premises, as shall seem meet
16 and agreeable to equity and good conscience.

And the complainant, as in duty bound, will ever pray, etc.

PAGE, EELLS & WHEELER,
Solicitors for Plaintiff.

EXHIBIT "A."

This indenture, made on the seventeenth day of July, one thousand eight hundred and ninety-one, between the Woodbridge Canal and Irrigation Company, a corporation duly created and organized under the laws of the State of California, and having its principal place of business in the city and county of San Francisco, in said State, and the location of its works in the county of San Joaquin, in said State (hereinafter called "the company"), party of the first part, and the Atlantic Trust Company, a corporation duly organized and existing under the laws of the State of New York, and doing business in the city of New York, as trustee (hereinafter called "the trustee"), party of the second part, witnesseth:

That whereas, the said Company is now the lawful owner of a certain irrigating canal, flume and head works in the County of San Joaquin aforesaid, and of various lands, tenements, hereditaments, privileges, franchises, rights of way, water rights and other easements, contracts, fixtures and property thereunto appertaining, and hereinafter more particularly described, enoveyed and assigned;

17 And whereas, the Company is desirous of fully completing and equipping the said canal and head works in the Mokelumne River, in accordance with the plan of its Chief Engineer, so as to enable the said Company to furnish water for the thorough and complete irrigation of about one hundred thousand acres of farming land, lying south and west of the said river, in said San Joaquin County;

And whereas, for the purpose of securing money for the objects aforesaid, and for the maintenance and operation of the said canal, and for the payment of said Company's existing indebtedness, and the general transaction of its business, the said Company desires to borrow the sum of one hundred thousand dollars;

And whereas, at a special meeting of the stockholders of said Company, duly called and held for that purpose on the 11th day of July, 1891, at the office of the Company, in the City of San Francisco, and State of California, it was duly resolved, by a vote of more than two-thirds in interest of said stockholders, that the said Company be authorized to borrow said sum, and to issue its bonds as hereinafter described, for said amount, and to execute its mortgage, or deed of trust, to secure the same, as may more fully appear by a reference to the said resolutions entered upon the minutes of the Company.

And whereas, the said Company, to that end, is about to execute and to place in the hands of the said Trustee, to be issued, certified and delivered, as shall be directed by resolution of the Board

18 of Directors of said Company, its one hundred corporate bonds of one thousand dollars each, numbered consecutively from one to one hundred, both inclusive, with semi-annual coupons or interest warrants attached, and with certificates to be signed by the said Trustee, all of which bonds, coupons and certificates are in the following form, that is to say:

(*Form of Bonds.*)

UNITED STATES OF AMERICA, *State of California.*

No. ——. $1000.

First Mortgage Convertible Gold Bond of the Woodbridge Canal and Irrigation Company.

The Woodbridge Canal and Irrigation Company, a corporation duly organized under the laws of the State of California, acknowledges itself indebted to the bearer, or to the registered owner thereof, in the sum of One Thousand Dollars, which it promises to pay in the gold coin of the United States of America, of the present weight and fineness, on the first day of September, in the year nineteen hundred and one, at the office of the Atlantic Trust Company, in the City of New York, with interest thereon, at the rate of six per centum per annum, payable semi-annually, at the same place, upon presentation and surrender of the coupons hereto annexed, on the
19 first day of March and September, in each year, as they respectively become payable, so long as the principal remains unpaid.

This bond is one of a series of one hundred bonds, of similar amount, tenor and date, which are secured by a mortgage or deed of trust, bearing date this day, executed and delivered by the Woodbridge Canal and Irrigation Company to the Atlantic Trust Company, as Trustee, conveying and assigning to the said Trustee all its corporate property and franchises now owned or hereafter acquired.

Any lawful holder of this bond, upon presenting the same at the office of the said Trustee, with all unmatured coupons attached thereto, may have the same registered in his own name, or that of any other person, in a book to be kept for that purpose, and such name, with the date of registry, shall be endorsed upon the bond by the said Trustee. From the date of such registry until, by a like endorsement, it be again made payable to bearer, such bond shall be transferable only by a written transfer thereof on the books of the Trustee, such transfer, and the date thereof, to be in like manner endorsed upon the bond, and while so registered all payments becoming due thereon, either for principal or interest, shall be paid only to such registered owner or to his order. Successive registration and transfers to bearer may be made at the option of any lawful holder and owner of this bond.

It is expressly agreed that in case default shall be made in the payment of any semi-annual installment of interest on the
20 day whereon the same shall fall due, as herein provided, or in the performance of certain covenants contained in said mortgage or deed of trust, and should default in any of such cases continue for the space of six months, then, and in either, of such cases, the principal sum herein mentioned may, as in said mortgage or deed of trust provided, immediately become due and payable, anything herein contained to the contrary notwithstanding.

At any time between the first day of July, 1894, and the first day of January, 1895, this bond, upon presentation and surrender thereof, to the said company with all unmatured coupons attached, may, at the holder's option, be converted into the capital stock of this company at par, and the holder in such case shall be entitled to receive in payment of this bond one thousand shares of said capital stock of one dollar each, said stock being reserved in the treasury of the company for that purpose.

This bond is also entitled to the benefits of the sinking fund in said mortgage or deed of trust provided for. The holder of this bond, by acceptance thereof, hereby waives any personal claim or demand against the stockholders of said company, for the indebtedness incurred hereby.

This bond shall not become valid or obligatory until the certificate endorsed hereon shall have been duly signed by or in behalf of the said Atlantic Trust Company as trustee.

In witness whereof, the Woodbridge Canal and Irrigation
21 Company has caused these presents to be sealed with its corporate seal, and to be signed by its president and attested by its secretary, and the annexed coupons to be executed with the engraved signature of its secretary, this — day of ——, one thousand eight hundred and ninety-one.

—— ——, *President.*

Attest: —— ——, *Secretary.*

(*Form of Coupon.*)

$30.

On the first day of —— 18—, the Woodbridge Canal and Irrigation Company will pay, at the office of the Atlantic Trust Company, in the City of New York, upon presentation and surrender of this coupon, to the bearer, or to the registered owner hereof, thirty dollars in United States gold coin for six months' interest then due on Bond No. ——.

—— ——, *Secretary.*

(*Form of Trustee's Certificate.*)

The Atlantic Trust Company hereby certifies that the within bond is one of the bonds issued under and in pursuance of a certain mortgage or deed of trust, dated —— and duly executed and delivered to said Company, as Trustee, by the Woodbridge Canal and Irrigation Company.

THE ATLANTIC TRUST COMPANY,
By —— ——, *President.*

22 Now, therefore, this indenture witnesseth, that for the purpose of securing the said bonds for $100,000, to be issued as herein provided for, and the interest thereon, according to the true intent and meaning thereof, and also for and in consideration of the premises, and of ten dollars to it in hand paid by the said

Trustee, at or before the execution and delivery of these presents receipt whereof is hereby acknowledged, the said Woodbridge Canal and Irrigation Company has bargained, sold, granted, conveyed, assigned and set over, and by these presents does bargain, sell, grant, convey, assign and set over unto the said Atlantic Trust Company, as Trustee, its successors and assigns, the entire corporate property of said Woodbridge Canal and Irrigation Company, and all its lands, tenements, hereditaments, privileges, franchises, rights of way; flowage and riparian rights, easements and fixtures now owned or hereafter to be acquired, and all its canals, flumes, headworks, gates, dams, bridges, etc., now constructed or to be hereafter constructed, extending from the present point of diversion, in the Mokelumne River, in the town of Woodbridge in San Joaquin County aforesaid, in a westerly direction, to Taison and New Hope, in said county, and in an easterly and southerly direction to the Calaveras River, with all other or branch canals that may be hereafter constructed within said territory, south and west of the Mokelumne River, and all the estate, right, title and interest, claims and demands, rights of way, and other easements, whether at law or in equity of the said Company of, in and to the same, and each and every part
23 and parcel thereof; and also all buildings, fixtures and personal property thereon, or belonging to said Company, and all receipts, incomes and profits which said Company shall derive on account of any contract or agreement for the transfer of water rights, as appurtenant to specified lands, excepting and not including the annual rentals for the use of said water and interest on such contracts or agreements.

To have and to hold the above granted premises and property with the appurtenances, unto the said Trustee, its successors and assigns, in trust and upon the trusts, uses and purposes hereinafter expressed of and concerning the same, for the use and benefit of any and all persons or corporations, who shall hereafter at any time become the purchasers, holders or owners of any of said bonds, subject to the terms, provisions and stipulations in said bonds contained, and also subject to the possession and management of said canal system and property by said Company, its successors, assigns or lessees, so long as no default shall be made in the payment of either interest or principal of said bonds, as herein provided, and so long as the said Company shall well and truly observe, keep and perform all and singular the covenants, agreements, conditions, and stipulations in said bonds, and in this indenture, contained and set forth, and which are to be observed, kept and performed by and on the part of said Company.

Article First.

It is further agreed that the Company, with the consent in writing of the Trustee or its successor or successors, may sell and
24 convey any lands or other property herein mortgaged and not necessary or required to be retained for the convenience and use of the Company, and that the proceeds of said sales whenever they amount to the sum of one thousand dollars, or more, shall

be applied to the purchase and cancellation of one or more of said mortgage bonds as hereinafter provided for, or of any lien which may be a prior lien upon the premises mortgaged. And the Trustee shall then be authorized to release the land or other property thus sold and conveyed from this mortgage; or in lieu of purchasing and canceling said bonds, the proceeds of said sale may be invested under the sanction and with the approval of the Trustee, in the purchase of other property, real or personal, required for use by said Company, which said other property shall be deemed as embraced in, and covered by, this mortgage.

Article Second.

It is further mutually agreed, that until the 1st day of January, 1895, unless sooner exchanged in payment of bonds as herein provided for, the Company will reserve in its Treasury one hundred thousand shares of the capital stock of this Company of the par value of one hundred thousand dollars, being the increase thereof duly authorized by the stockholders of said Company at a meeting held and called for that purpose on the 11th day of July, 1891.

At any time between the 1st day of July, 1894, and the 1st day of January, 1895, upon the presentation and surrender to the Company of one or more of the bonds herein provided for, together with
25 all the unmatured coupons thereto attached, the Company will deliver to the person or persons so surrendering said bonds in full payment therefor, a certificate or certificates representing one thousand shares of said capital stock so reserved for each bond of the face value of $1,000, and all unmatured coupons annexed, and all bonds surrendered shall be forthwith canceled.

Article Third.

It is further mutually agreed that all moneys received by the Company on account of any contract or agreement, now executed or hereafter to be executed, for the transfer of water rights as appurtenant to specified lands, excepting interest on such contracts or agreements, and rentals, as the same accrue and are received, to the amount of the bonds sold and delivered, shall be paid by the Company to the said Trustee, to be held by the Trustee as a sinking fund for the redemption of the bonds herein provided for. And whenever and as often as the sum of five thousand dollars or more shall be held by the said Trustee in said sinking fund, the Trustee shall, whenever requested in writing by the Company, forthwith give notice by publication in a newspaper, published in the City of New York, and a newspaper published in the City of San Francisco, for such time as it may deem advisable, that it will purchase and redeem out of said sinking fund, after deducting the expenses of said publication, bonds, to the extent of the cash available in said fund, at a price not exceeding par and accrued interest. And such
26 bonds as may be purchased and redeemed by the Trustee shall be forthwith canceled; and should none be offered, the Trustee shall retain the moneys in said sinking fund at interest,

until another like sum of five thousand dollars shall be paid into said fund, in which case the same proceedings shall be again taken as above set forth.

Article Fourth.

The Company covenants and agrees to use the bonds herein provided, for the following purposes only:

To provide funds to extend and thoroughly complete, equip and maintain the canal and its branches; to erect a dam or dams in the Mokelumne River, and maintain the same, to pay and discharge the floating debt of said Company, and to provide the necessary funds for the general expenses of the Company.

And the Trustee shall, from time to time, upon the joint order of the President and Secretary of the Company, making request therefor, issue and deliver to the persons named in said order, the bonds, or any of them herein provided for.

Article Fifth.

And the Company does hereby covenant, promise and agree for itself, its successors and assigns, to and with the Trustee and its successor or successors, that the said Company will well and truly pay each and every of said bonds issued by it and secured by this mortgage, together with the semi-annual interest, at the rate of six per cent. per annum, at the times, in the manner, and at the
27 places specified therein, without deduction for any cause.

And in case the Company shall, for the space of six months, make default in payment of said semi-annual interest to become due on any, either, or the whole of said mortgage bonds, then after the expiration of said six months from the time it became due, and without demand or notice, at the election or option of the majority in interest of the holders of said bonds then issued and outstanding expressed in writing, the whole principal sum mentioned in each and all of said mortgage bonds then outstanding, shall forthwith become due and payable, and the lien and encumbrance hereby created for the security and payment thereof may at once be enforced.

Article Sixth.

It is further agreed in case of default in the payment of the semi-annual interest of the said bonds for the space of six months or of any tax or assessment for the same period, that the Trustee and its successors are hereby expressly authorized and empowered, upon the request in writing of the owners or holders of the majority of said bonds, then outstanding, or if the principal of the bonds shall be due, upon the request of the holders of a majority of the bonds outstanding, to enter into and upon, and to take actual possession of all the property, real and personal, and rights, franchises and privileges of the premises hereby conveyed, and each and every part thereof, and by themselves, or by their attorneys or agents, have, hold,
28 use and enjoy the same, and from time to time make all repairs and replacements, and all useful alterations, additions

and improvements thereto, as fully as the Company might have done before such entry, and to collect and receive all tolls, incomes, rent, issues and profits of the same and of every part thereof. The Trustee and its successor or successors shall and may, and hereby are expressly authorized and empowered on such default to sell at public auction, to the highest bidder, the entire property, real and personal, rights, franchises and privileges herein conveyed. Said sale shall be held either in the City of Stockton, or the City of San Francisco. At least two months' notice shall be given of the time, place and terms of said sale, by advertising the same in one or more newspapers of good circulation, in the City of San Francisco, and wherever else required by law, and continuing such advertisement at least once a week, until the time of sale; and the Trustee may, at its discretion, adjourn said sale from time to time, giving reasonable notice of the time and place where it will take place, and as the attorney or attorneys in fact of the Company, or its successors and assigns, shall have full power and authority to make, execute and deliver to the purchaser or purchasers thereof good, valid and sufficient deed or deeds, conveyance or conveyances, assignments or transfers, in fee simple or otherwise, of the entire property herein conveyed, and all the rights, franchises and privileges of the Company, or its successors or assigns, which conveyance or conveyances, transfer or deeds, shall vest in the purchaser or purchasers all the right, title, inter-
29 est and estate whatsoever, reversionary, or in possession, or which they may be entitled to receive, have or hold of the Company; and said sale shall be a complete and perpetual bar or estoppel, both in law and in equity, against the Company, its successors and assigns, and all persons or parties lawfully claiming by, from or under it or them, in anywise or manner whatsoever, and the said Company hereby covenants and agrees to waive, and expressly covenants and agrees that neither this Company, nor its successors, shall have or claim any advantage of any valuation, appraisement or extension.

The amount of the purchase money on said sales may be paid and satisfied in whole or in part by the outstanding mortgage bonds, and matured and unpaid coupons, or any of them secured hereby; and said bonds and coupons shall be received in whole or part payment and satisfaction by the Trustee, its successor or successors, according to their value, to be ascertained and determined by the net amount arising from said sale, provided however that, if during the pendency of such proceedings, or of any foreclosure proceedings for nonpayment of interest coupons, the said interest be paid, together with the expenses of the legal proceedings then taken, all foreclosure or other proceedings shall then terminate and be discontinued.

Article Seventh.

Out of the moneys received from any tolls, income, rents, profits and earnings of said canal and premises, or out of the pro-
30 ceeds of said sale, so to be made as aforesaid, or the Sinking Fund as above provided for, after first deducting the expenses, disbursements, costs, charges, and counsel fees, incurred in

and about the conducting of said sale, or the working and operating said Canal, including the compensation and commission of said Trustee in and about the execution of this tru[illegible] and all expenses of repairs, replacements, alterations, additions and improvements, and all payments for taxes, assessments, charges or liens on said premises, or any part thereof, the Trustee shall, if the amount be sufficient for that purpose, pay said mortgage bonds, or so many of them as shall be outstanding and unpaid, together with all interest then due upon the same; and if the amount be insufficient, then it shall divide the same pro rata among the outstanding bonds, and the surplus of all such moneys or proceeds of sale, if any there be, shall be paid to the Company, or its successors or assigns.

Article Eighth.

Nothing herein shall be construed as limiting the right of the Trustee to apply to any competent Court for a decree of foreclosure and sale under this indenture, or for the usual relief in such proceedings, and the said Trustee, or its successor, may, in its discretion, so proceed.

Article Ninth.

The said Trustee shall be entitled to a reasonable compensation for its services rendered under the trusts herein created, and
31 also to reimbursement for all expenses, legal or otherwise, necessarily incurred by it in administering the same, and all such compensation and expenses, are secured hereby.

In case it shall be required by the holders of the bonds secured by this indenture to enforce any of their rights hereby secured, the said Trustee shall not be required to incur any expense or liability in connection therewith, until satisfactorily indemnified therefor, and all powers in these presents conferred upon the Trustee (except as otherwise herein specifically provided) shall be deemed discretionary, and it shall incur no liability in exercising or declining to exercise such discretionary powers, provided it acts in good faith in regard thereto.

Article Tenth.

And it is further agreed that the Trustee, or its successor, may appoint and employ, at the expense of the said Company, all such attorneys or other agents, as may be necessary in the execution of any of the trusts herein declared, and shall not be answerable for the defaults or other misconduct or neglect of such attorneys, or other agents, unless chargeable with culpable negligence in their selection.

Article Eleventh.

And it is further agreed, that in the case of the death, removal, resignation, incapacity or insolvency of the Trustee or its successor, or in case two-thirds in interest of the holders of outstanding bonds at any time so elect, a majority in interest of the outstanding bondholders may, by a writing under their hands and seals
32 appoint and designate one or more competent persons or corporations to fill the vacancy so occurring in manner afore-

said; and until the bondholders make such selection, then the President of the Company, with the consent in writing of the owners or holders of one-tenth of all of said bonds outstanding may apply to a Judge of any Court of competent jurisdiction, who shall appoint one or more persons to fill the vacancy until the bondholders make an appointment; and in either case the person or persons selected shall have and possess, and be vested with, the same rights and powers as a Trustee or Trustees, as he or they would have had or possessed or been vested with, had he or they been originally made a party or parties to this indenture, and shall perform said duties in all respects; and until such appointment shall be so made, in manner aforesaid, said remaining surviving, acting or competent Trustee shall have full power and authority to execute each and all trusts hereby created.

In case at any time thereafter, two or more Trustees should be appointed in the place of the one herein named, and there should thereafter become a vacancy by the death, resignation or removal of one or more of said Trustees, the remaining Trustee or Trustees, until such time as another may be appointed shall perform all the duties of his trust, and during such time all acts done by him shall be as valid as if performed by all the Trustees.

33

Article Twelfth.

And the Company, for itself and its successors and assigns, hereby covenants and agrees for the consideration aforesaid, to execute and deliver any further deed or deeds to the Trustee, its successor or successors, reasonable and necessary to accomplish the purpose and intent of this indenture, particularly for the conveyance of any right, interest or property acquired by said Company subsequent to the date of this agreement.

Article Thirteenth.

The Company further agrees, that it will well and truly pay and discharge each and every tax, or assessment, which may, from time to time, be lawfully levied upon the said property or franchise, the lien of which might or could be held superior to the lien of this indenture, to the end that the priority of the lien created by this indenture may at all times be fully sustained.

Article Fourteenth.

The trustee hereby accepts the trusts herein contained and undertakes and agrees to fulfill all the duties and obligations hereby imposed upon it in accordance with the true intent and meaning of this indenture.

Article Fifteenth.

The said Company, for itself, its successors and assigns, the above granted and bargained premises unto the said Trustee, its successors and assigns, will forever warrant and defend against all lawful claims and demands whatsoever, against the same.

34 Article Sixteenth.

Provided always, and this grant and conveyance is upon the express condition that upon the payment in full of such of said bonds, as shall have been issued and sold, and the interest due thereon and upon the surrender thereof to the Company, and due proof of such payment and surrender to the satisfaction of the Trustee or its successor, or at any time before any of said bonds are sold and issued, on the demand in writing of said Company for the cancellation of said deed of trust, then the estate, title and interest of the said Trustee, or its successor, shall cease, determine and become void, and said Trustee shall, upon the request of the Company, its successors or assigns, duly execute and deliver such proper release or reconveyance as may be necessary for the purpose of revesting the record title to said property in the Company, its successors or assigns, free from all liens, trusts or encumbrances hereby created.

In witness whereof, the said parties of the first and second parts have caused these presents to be sealed with their corporate seals and subscribed by their respective presidents, and attested by their respective secretaries, on the day and year first above written.

The word "Trustee" having been first stricken out, and the word "Company" inserted in lieu thereof in line (19) nineteen of page (2) two hereof.

[CORPORATE SEAL.]

WOODBRIDGE CANAL AND IRRIGATION COMPANY,

By M. V. B. WATSON, *President.*

35 Attest:

M. T. MOSES, *Secretary.*

ATLANTIC TRUST COMPANY,

[CORPORATE SEAL.] By W. H. MALE, *President.*

Attest:

J. S. SUYDAM, *Secretary.*

Signed, sealed and delivered by the above-named Woodbridge Canal and Irrigation Company in the presence of

LINCOLN SONNTAG.

And by the above-named Atlantic Trust Company in the presence of

STANLEY W. DEXTER.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this seventeenth day of July, in the year one thousand eight hundred and ninety-one, before me, Lincoln Sonntag, a notary public in and for said city and county, residing therein, duly commissioned and sworn, personally appeared M. V. B. Watson, known to me to be the president of the corporation "Woodbridge Canal and

Irrigation Company," that executed the within instrument, and M. T. Moses, known to me to be the secretary of the said corporation, and they each severally acknowledged to me that such corporation executed the same.

[NOTARIAL SEAL.] LINCOLN SONNTAG,
Notary Public.

36 STATE OF NEW YORK,
City and County of New York, ss:

On this fourth day of August, in the year one thousand eight hundred and ninety-one, before me, Stanley W. Dexter, a notary public in and for said city and county, residing therein, duly commissioned and sworn, personally appeared W. H. Male, known to me to be the president of the corporation "Atlantic Trust Company," that executed the within instrument, and J. S. Suydam, known to me to be the secretary of the said corporation, and they each severally acknowledged to me that such corporation executed the same.

[NOTARIAL SEAL.] STANLEY W. DEXTER,
Notary Public.

[Endorsed:] Recorded at Request of Atlantic Trust Co. August 10th, 1891, at 20 min. past 2 o'clock P. M., in book "A," vol. 74, 361 of Deeds, San Joaquin County Records.

(Here follows Exhibit "B," Schedule of Properties.)

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Charles P. Eells, being duly sworn, deposes and says: That he is one of the attorneys for complainant, the Atlantic Trust Company, and makes this affidavit on its behalf; that said complainant has no officer or other agent in the State of California; that he has read the foregoing bill of complaint and knows the contents thereof;
37 that the same is true of his own knowledge, except as to the matters therein stated on his information or belief, and that as to those matters he believes it to be true.

CHARLES P. EELLS.

Subscribed and sworn to before me this 3d day of October, 1894.

W. B. BEAIZLEY,
Commissioner U. S. Circuit Court,
Northern District of California.

[Endorsed:] Bill of Complaint in Equity. Filed October 3, 1894. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

ATLANTIC TRUST COMPANY, Plaintiff,
vs.
WOODBRIDGE CANAL AND IRRIGATION COMPANY, Defendant.

Order Appointing Receiver.

The bill of complaint having been filed in this action for the foreclosure of a mortgage upon the canals and other properties of the Woodbridge Canal and Irrigation Company by the plaintiff as trustee for the bondholders of said canal company, which
38 complaint is duly verified; and it appearing to said Court therefrom that a case for the appointment of a receiver exists in this action, and holders of a large amount in value of the bonds secured by said mortgage having requested the appointment of E. C. Chapman to be such receiver, and the defendant Woodbridge Canal and Irrigation Company being present by its counsel and consenting to this order; and it further appearing that said E. C. Chapman is in all respects a suitable and competent person to be appointed such receiver—

Now, on motion of counsel for said plaintiff, it is ordered that E. C. Chapman, of the city and county of San Francisco, be and he is hereby appointed the receiver of all and singular the property, canals and franchises of the defendant, the Woodbridge Canal and Irrigation Company, including all the property mentioned and described in the complaint in this action, with all the records, books, papers and accounts of said defendant corporation, in anywise appertaining to the business thereof.

The said receiver, before entering upon his duties, shall be sworn to perform them faithfully, and shall also execute and file with the clerk of this court an undertaking with one or more sufficient sureties to be approved by the Court, in the sum of ten thousand dollars, to the effect that he will faithfully discharge the duties of receiver in this action, and will obey the orders of the Court therein. On said bond being filed and approved by this Court or a Judge thereof, and said oath being taken and filed, said receiver shall forthwith
39 enter upon the performance of his duties. It is further ordered:

I.

As soon as may be after he shall have entered upon the performance of his duties, the said receiver shall make and file with the clerk of this court a true, full and complete inventory of all and singular the property of the said Woodbridge Canal and Irrigation Company, real, personal and mixed, of which he is hereby appointed a receiver, and of which he shall have taken possession.

Said receiver shall continue the operation of the main and branch canals of the said Woodbridge Canal and Irrigation Company in the usual and ordinary course as the same is now operated, discharging contracts for water supplies entered into by said company

so far as practicable; collecting the rents and tolls of said canals, and the moneys payable under water contracts, and keeping the premises and property, both real and personal, in good condition and repair. To the same end, he shall, from time to time, employ and discharge all needful assistants, servants, agents and employees, at such salaries and compensation as he may deem reasonable, and pay for all such needful labor and supplies and materials as may seem to him to be necessary and proper in the exercise of his sound discretion, for carrying on and keeping in repair said canals, with leave to apply to the Court from time to time as he may be advised for instructions in the premises. He shall have the power
40 to commence and prosecute any suits or actions he may deem it proper to commence hereafter, either in the name of the company or in his own name as receiver, as he may be advised, and to be substituted in place of said Woodbridge Canal and Irrigation Company in any suits now pending, which may affect the property whereof he is receiver. He shall do whatever may be needful to preserve and maintain the corporate franchises of said defendant corporation and its rights to the use of the water and all its property, until final judgment in this action, and to defray the necessary and proper expenses incident thereto.

III.

The said receiver shall keep a full, true and particular account of all his acts and doings as such receiver, of all the property, rents, revenues and income, and of all his payments and disbursements in the performance of the duties imposed by this order; and he shall file such account from time to time as this Court may direct. He shall keep all balance of moneys in his hands on deposit in some bank or banks of approved credit, subject to his order, and he shall not pay out but shall keep, subject to the further order of this Court, all such moneys, except in so far as payments and disbursements are authorized by the terms of this order.

The said defendant the Woodbridge Canal and Irrigation Company, and each and all of the officers and agents of said company, are directly commanded and enjoined to deliver up and sur-
41 render to said receiver, when he shall have become qualified according to the terms of this order to enter upon his duties, all and singular the premises and property whereof he is so appointed receiver.

Done in open court, this 3d day of October, 1894.

W. B. GILBERT, *Judge.*

Supplemental Order of Final Appointment.

And now upon this third day of October, A. D. 1894, Edgar C. Chapman, the receiver heretofore appointed herein, having filed herein his bond in the sum of ten thousand (10,000) dollars, with Benjamin G. Lathrop, Jr., and Edgerton F. Card, as sureties, in accordance with the decree entered herein, dated October third, 1894; and the said bond having been approved by the Court—

It is therefore ordered and decreed by the Court, that said receiver be and he is hereby invested with all the powers and authority, and charged with all the duties in said decree mentioned, and he is hereby authorized and directed to immediately enter upon the discharge of his duties as aforesaid and to take immediate possession of all and singular the property, rights, and franchises in said decree mentioned.

Dated October third, 1894.

W. B. GILBERT, *Judge.*

[Endorsed:] Filed October 3, 1894. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

42 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 11950.

ATLANTIC TRUST COMPANY, Plaintiff,

vs.

WOODBRIDGE CANAL AND IRRIGATION COMPANY ET AL., Defendants.

Report of Receiver.

(Filed December 29, 1894.)

To the Honorable, the Justices of the Circuit Court of the United States, of the Ninth Judicial Circuit, Northern District of California:

E. C. Chapman, receiver appointed by the Court in the above-entitled cause, now comes and reports to the Court as follows:

Upon receiving the order heretofore made by the Court in this cause appointing me receiver therein, and on the 3d day of October, 1894, I duly qualified as such receiver and entered upon the discharge of my duties as such. On the 4th day of October, 1894, I visited the office, property and works of the Company at Woodbridge in the county of San Joaquin, and was there by the superintendent in charge, placed in charge and possession of the properties of the corporation described in the schedule of properties handed to me at the time of my appointment, to wit:

43 Those certain irrigation canals situated and being in the county of San Joaquin, State of California, in township three (3) north of range five, six and seven (5, 6, 7) east, and being known and described as follows, to wit:

That certain dam built and constructed in and across from either bank of the Mokelumne river, in section 34, township 3 north of range — east.

*Franklin Canal, 601 miles.
Main Canal, East Branch, 9,880 miles.
East Branch, Excavation No. 3, 4,640 miles.
Davis ——, 2,408 miles.
North Branch, 2,043 miles.
Spanker Ditch, 1,505 miles.
West Branch Canal, 4,570 miles.
Carr Ditch, 410 miles.
Swain Lateral, 495 miles.
Castle Lateral, 653 miles.
Weber Lateral, 264 miles.
Harshner Canal, 1,070 miles.
Parsons Canal, 500 miles.

The above canals, ditches and laterals being part of the system located as its point of beginning at the dam in Mokelumne river at the town of Woodbridge in the east half of section 34, township 4 north of range —— east.

II.

Certain riparian rights, in all eighteen, along said Mokelumne river above and below the dam of the Woodbridge Canal and Irrigation Company.

44

III.

Certain grants of right of way lying and being within said township 5 north of ranges 6, 5 and 7 east, and township 4 north of ranges 5 and 6 east, numbering sixty-three in all, and having an aggregate acreage of 330.43 acres.

IV.

Certain contracts from the owners of the lands lying above said dam granting permission to said Woodbridge Canal and Irrigation Company as assignee to construct, maintain, etc., said dam in said river; numbering eleven in all.

V.

Certain parcels of real property situate and being in said county of San Joaquin, State of California, and bounded and particularly described as follows, to wit:

a. Being a small piece of land adjoining Block 2 in the town of Woodbridge, known as the "Mill Property," being the land on which was erected the old flouring mill and building heretofore sold to C. C. Blair; and further described as Lots 4, 5, and 6 in block F of Wood's Survey of the town of Woodbridge.

b. 13.88 acres of land, situate, lying and being in said San Joaquin County on the North Bank of the Mokelumne river, immediately opposite said town of Woodbridge and immediately adjoining

*[These figures are apparently wrong, but they are as certified — rep.—The CLERK.]

the said dam of the said Woodbridge Canal and Irrigation Company, and known as and called the "Cowboy Tract."

c. Certain bottom lands along the north side of said river adjoining the dam and works of said company at Woodbridge, and lying on the north side of said Mokelumne river; comprising in all
45 96.95 acres, and known and described as the "Journmay Purchase."

d. Those certain bottom lands situate in said county of San Joaquin, and described as fractions No. 1 and 2 and the east half of the southwest quarter of section 32, township 4 north of range 7 east, M. D. B. and M.

VI.

Those three certain water rights and locations on the Mokelumne river at said Woodbridge, notices of which said locations were posted by Byron D. Beckwith on the bank of said river on the 22d, 23d, and 30th days of December, 1886, respectively, and filed in the office of the county recorder of San Joaquin County aforesaid on the 31st day of December, 1886.

VII.

Those three certain water locations and claims to water flowing into the Mokelumne river, particularly described as follows, to wit:

a. A claim to said water to the extent of 250,000 cubic inches per second at the point on the north bank of said river about 250 feet above and on the opposite side of where Green's mill formerly stood in the town of Woodbridge. Notice of which bearing date the 19th day of May, 1890, and recorded May 20th, 1890, in book "G," volume 8, page 251 of Miscellaneous Records of San Joaquin County, in the office of the county recorder of San Joaquin County.

b. A claim by one H. P. Perkins to said water to the extent of 345,600 inches, at the point where notice in writing was duly
46 posted, that point being a pine tree on the south bank of said river near a suspended water pipe which leads across said river. Said notice bearing date November 6th, 1890, recorded November 30th, 1890, in book "L" of Mining Claims, pages 544 and 545, in the office of the county recorder of Calaveras County.

c. A claim to said water to the extent of 400 cubic feet per second at the point where notice in writing was duly posted by Byron D. Beckwith, that point being on the north bank of the Mokelumne river, on a live oak tree about 300 feet north of a suspension pipe across said river; said notice being dated January 25th, 1892, and recorded January 26, 1892, in book "A" of Water Rights, page 186, in the office of the county recorder of Amador County.

VIII.

All those certain pieces and parcels of land, being in the counties of Calaveras and Amador, and bounded and particularly described as follows, to wit:

The fractional southeast quarter of the southwest quarter of section 33, and fractional northwest quarter of the southwest quarter

of section 54, township 5 north of range 10 east, M. D. B. and M.; more particularly described in that deed made by Byron D. Beckwith to the Woodbridge Canal and Irrigation Company the 8th day of February, A. D. 1894, and recorded on the 27th day of June, 1894, in book "A," volume 83, page 78 of Deeds, San Joaquin County Records; and in volume 24 of Deeds at page 326, Calaveras
47 County Records; and recorded in volume 10 of Deeds at page 269 of the records of Amador County.

The said parcels of land containing in all 46.61 acres.

IX.

Certain tools and implements used in and about said irrigation canal in the maintenance of said works; office fixtures, three horses, one buggy and harness. Also about 13,000 feet of mixed lumber of uncertain value.

X.

Those certain promissory notes, payable to the Woodbridge Canal and Irrigation Company, and described as follows, to wit:

Note of A. M. Harshner, dated November 21st, 1892, for $400.00.

Note of E. J. and S. A. Parsons, dated January 31st, 1893, for $1,600.00.

Note of Helen Weber, C. M. Weber and Julia H. Weber dated May 28, 1894, for $3,946.02.

Note of Helen Weber, C. M. Weber and Julia H. Weber, dated May 28th, 1894, for $4,591.85.

Note of Helen Weber, C. M. Weber and Julia H. Weber dated May 28th, 1894, for $1,963.66.

Note of J. Bischofberger, dated May 28th, 1894, for $1,530.20.

Note of H. C. Heron, dated May 28th, 1894, for $1,854.25.

Note of Mrs. M. A. Shinn, dated May 28th, 1894, for $425.00.

48 Note of F. T. Coman, dated May 28th, 1894, for $648.00.

Note of A. M. Harshner, dated May 28th, 1894, for $400.

Note of T. E. Jones, dated June 25th, 1894, for $896.37.

XI.

All that certain right of way across a strip of land granted by J. J. Hinckley and wife to the Woodbridge Canal and Irrigation Company, along and over certain land of said Hinckley from the county road to the land acquired by said Woodbridge Canal and Irrigation Company on the 8th day of February, 1894, from Byron D. Beckwith hereinabove in this schedule specified.

I thereupon took charge of the office at Woodbridge and placed Mr. John Torey, Jr., a bookkeeper, in charge for me, with instructions to balance up the books and furnish me a trial balance and to furnish me a list of all bills receivable, securities and other papers belonging to or affecting the property of the corporation found in said office, or in the safe thereof. He proceeded to do so, and

among other things furnished me with a trial balance, a copy of which is hereto annexed, marked Exhibit "A," and made a part of this report; also a list of bills receivable, a copy of which is hereto annexed marked Exhibit "B" and made a part of this report; also a list of outstanding time checks issued to laborers and employees of said corporation, and appearing to remain unpaid a copy of
49 which list is hereto annexed marked Exhibit "C" and made a part of this report; also a list of deeds, conveyances, grants of right of way, licenses and other evidences of title, or rights to water, or rights of way, a copy of which list is hereto annexed marked Exhibit "D" and made a part of this report.

After balancing up the books and completing his labors at said office, and at the expiration of one month and four days after so placing Mr. Torrey in charge, I discharge- him from further service at that office, and placed the office and the properties theretofore under the charge of that office in charge of H. F. Mannion, as superintendent in charge under me.

Immediately after making these arrangements at Woodbridge I returned to San Francisco, and at the general office of the corporation demanded possession of all the books, papers, and properties of the corporation held at that office. These were promptly turned over to me, and the keys of said office were delivered to me, but being doubtful of my right to prevent the officers of the corporation from having access to the minute book and other strictly corporate books, I placed the secretary of the corporation in charge of said office, and he is still in said office in charge of said books, I however, having free access to same for purposes of information or any of the purposes required in the performance of my duties.

For the purpose of protecting said works and property and of preventing the destruction and waste thereof, I have found
50 it necessary to employ and have employed in addition to the bookkeeper aforesaid, one man to have the charge of and preserve the rights of the property of the corporation at the upper water claim on the Mokelumne river near Campo Seco who is employed at a salary of $2.50 per day; also another on the lower location near the town of Woodbridge in San Joaquin County at a salary of $2.00 per day, also a night watchman at the dam near Woodbridge at $2.50 per day; also the superintendent in general charge of the works, whose services are worth about $5.00 per day; also a young man to assist said superintendent at $2.50 per day; I also found it necessary to employ the former assistant superintendent of the works for the period of two weeks and at a cost of $50.00 to go over the entire works with me and specifically point out the property of the corporation. I have also been compelled to cause certain repairs to be made upon the dam near Woodbridge, which has been done at a cost of $297.04 exclusive of the service of the superintendent.

As such receiver there has come into my possession the sum of $875.73 in money, the property of said corporation, and my disbursements as such receiver have been as follows:

To paid out for work done for labor at the dam at Woodbridge as above stated	$297.04
To paid for Wells, Fargo envelopes	.10
To paid expressage on time check mem. sent to the Secretary upon Mr. McAllister's telegraphic request	.25
To paid for stamps	.50
51	
To paid for P. O. Box	.40
To paid express charges by river express on typewriter, Stockton to San Francisco and return	.70
To paid W. C. Pidge	2.00
To car fare, 2.95; livery, 1.00; meals, .50	4.45
To paid telegram	1.00
To candles, .15; tool sharpening, .25	.40
To stamps	.50
To paid J. J. Hinckley	40.00
To paid Elliott Bray	30.00
To paid N. I. Baldwin	50.00
To paid John Torrey	100.00
To paid taxes	156.91
To pump handle, .25; hotel bill, Hinckley's, 2.00	2.25
To harness hire	.50
To stamps, 1.00; telegram, .25	1.25
To paid Elliott Bray	5.00
To board bill	22.50
To fare to Stockton and return	.90
To paid J. Torrey, Jr.	13.33
To paid F. M. Limbaugh	15.00
To paid for rent of office	4.00
To paid H. F. Mannion	70.88
To trips to Stockton and Campo Seco	82.80
	$903.66

52 *Recapitulation.*

Total paid out	$903.66
Total cash received	$875.73
Balance due me	$27.93

And the said receiver respectfully represents to the Court that he is without funds to reimburse himself for the balance of cash expended as aforesaid, or to pay the accruing expense for men in his employ, or to pay his own personal expenses in attending to the business, or wherewith to pay counsel for services rendered in his behalf, and he prays the court for an order authorizing him to borrow the sum of seven thousand five hundred ($7500.00) dollars to be used for the purposes aforesaid, and accounted for to the Court.

Dated this 26th day of Dec., 1894.

E. C. CHAPMAN, *Receiver.*

FOX, KELLOGG & GRAY,
Attorneys for Receiver.

53 EXHIBIT "A."

Trial Balance.

From

Books of the Woodbridge Office of the Woodbridge Canal and Irrigation Company, showing the condition of the various accounts as written up to the time when the Receiver of said Company, under appointment from the United States Circuit Court, took possession of the affairs of said Company on the morning of October 4th, 1894.

Profit and Loss	.....	.65
Construction	11,735.53	
Canal Expense	9,920.99	
Discount	.....	1.25
Office Fixtures	179.75	
Lumber	10,748.10	
Material	1,964.29	
Tools and Implements	1,097.45	
Pile Setting	958.75	
Real Estate	15,680.00	
Bridges and Culverts	2,408.31	
Exchange and Interest	.....	373.19
Feed Account	650.90	
Rights of Way	9,416.76	
Repairs	907.13	
Franklin Canal	1,256.22	
B. A. Laws	200.00	
J. C. Thompson	.....	7.00
Water Rights	.....	58,211.99
54		
Bank of Lodi	6.29	
Freight	448.91	
Ah Hong	.....	2,329.50
W. H. Williams	.....	1,646.92
San Francisco Office	.....	85,891.48
Ezra Fiske	19.05	
Chris Franklin	13.71	
John Lane	.....	.25
Labor	45,928.40	
East Branch Canal Exten. No. 2	23,561.32	
Cash	82.30	
W. C. Pidge	.....	1,408.00
J. G. Swinnerton	.....	25.00
Time Checks	.....	20,242.85
H. Bentley	.....	122.00
Upper Location	8,215.92	
Expense	9,466.37	

Dam and Headgates Repairs	28.60	
Canal Repairs	21.40	
Davis Canal	2,306.23	
Woodbridge Yard	167.50	
P. A. Buell & Co	.....	10.47
North Branch Canal (3,173.74)	3,173.74	
Spenker Ditch	2,143.13	
Helen, Chas. M., and Julia H. Weber	30.42	
East Branch Yard	105.29	
H. C. Herren	28.43	
Taxes	8.25	
55		
Team and Buggy Account	338.00	
Harshner Canal (254.15)	254.15	
Stable Expense	2.05	
Team and Buggy Expense	60.40	
Forward	163,534.04	170,270.55

2. Woodbridge Trial Balance.

Brought forward	163,534.04	170,270.55
Accident Account	255.55	
Water Rights Expense	22.50	
Blanks and Stationery	44.50	
Recording	205.00	
Real Estate Expense	67.70	
Advertising Account	400.00	
Right of Way Expense	23.50	
Richard Cope	.....	20.00
Wright and Corsen	.....	7.12
Lodi Sentinel	.....	3.00
A. H. Randall	.....	680.00
E. M. and M. Carr	14.60	
Extra Irrigation	.....	100.25
Cornelius Swain	271.00	
Jno. A. Swain	2,000.20	
H. K. Goodwin	.....	5.15
J. U. Castle	1,600.00	
Stockton Evening Mail	.....	200.00
R. E. Wilhoit & Sons	.....	2.00
Stockton Daily Independent	.....	321.00
J. W. Kerrick	.....	16.65
Mrs. C. Gerard	.....	1.30
56		
S. Newell	62.80	
West Branch Canal	2,800.80	
R. W. Williams	.....	11.00
R. J. & S. A. Parsons	229.34	
Mrs. E. Franklin	.....	280.05

C. W. & P. Yolland	1.75	
H. Beckman	717.70	
Script (Woodbridge Issue)	.....	898.58
T. R. Burkett	.....	37.70
Annual Rentals	.....	2,778.23
L. M. Morse	254.40	
A. M. Harshner	.....	22.80
E. L. Carver	.....	12.00
A. H. Cowell	.....	46.80
Noble & Reid	.....	21.50
Carr Ditch	1,232.80	
Swain Lateral	323.15	
Castle Ditch	737.45	
Weber Ditch	428.37	
Damage Account	560.00	
J. J. Collins	.....	51.47
	175,787.15	175,787.15

(Here follow Exhibits "B," "C" and "D.")

[Endorsed]: Filed December 29, 1894. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

57 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 11950.

ATLANTIC TRUST COMPANY, Plaintiff,
vs.
WOODBRIDGE CANAL AND IRRIGATION COMPANY ET AL., Defendants.

Order Authorizing and Directing Receiver to Borrow Money.

This cause having come on regularly to be heard in its order on the twenty-first day of January, A. D. 1895, upon the application of Edgar C. Chapman, Esq., receiver heretofore appointed in this cause, for leave to borrow money for the purpose of paying expenses of the care and management of the property which has come into his hands as such receiver and of conducting the business of the same as a going property; and upon due notice given to the plaintiff in said cause and to the defendant and also to the interveners in said cause, the plaintiff having failed to appear upon said hearing and the said interveners having appeared by their respective counsel and the said application having been heard upon the report and petition of said receiver and upon the evidence given in open court, and it appearing to the Court that the said receiver is without funds with which to pay the necessary or any of the necessary expenses
58 incurred or to be incurred by him as such receiver and that there is no present income from the said property, that the same is a going property, that the said receiver has already neces-

sarily incurred expenses and thereby created indebtedness for such expenses in the care and management of said property to the amount of twelve hundred dollars or thereabout and that further expenses of such management and care must be continued from day to day in order to preserve the said property from waste or injury, and it appearing to the Court that it is a proper case therefor, and the defendant in said cause consenting in open court thereto—

It is by the court now here ordered that the said receiver, Edgar C. Chapman, be and he is hereby authorized and empowered as such receiver and for the purposes aforesaid, to wit, for the purpose of paying the expenses and indebtedness already incurred by him in the management of said property and of paying the continuing and accruing expenses of such management, to borrow the sum of five thousand ($5,000.00) dollars to be used by him as such receiver for the purposes aforesaid and to be accounted for to the Court from time to time, and to issue his certificate or certificates therefor payable out of any funds that may come into his hands as such receiver applicable thereto, with interest thereon at such rate as he shall find necessary in order to secure such loan but not to exceed eight per cent. per annum, and that he be and he is hereby authorized to hypothecate or assign any and so many of the notes and mort-
59 gages or other choses in action belonging to the corporate defendant and which have come into his hands as such receiver as may be necessary as collateral security, for the payment of the certificate or certificates so issued by him with the interest thereon, with power to collect the moneys that may become due upon the notes and mortgages or choses in action so assigned and apply the same to the payment of the indebtedness evidenced by said certificate or certificates, the surplus, if any, to be returned to said receiver or the said notes, mortgages or choses in action so assigned as aforesaid to be reassigned to said receiver as such upon the payment of the indebtedness evidenced by the certificate or certificates aforesaid; and that the said receiver report to this Court from time to time his doings under this order together with the amount of money which he may have realized thereunder and his disposition thereof.

Dated this twenty-third day of January, A. D. 1895.

JOSEPH McKENNA, *Judge.*

[Endorsed:] Filed Jan. 23, 1895. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

60 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 11950.

ATLANTIC TRUST COMPANY, Plaintiff,
vs.
WOODBRIDGE CANAL AND IRRIGATION COMPANY ET AL., Defendants.

Report and Petition of Receiver.

(Filed January 31, 1895.)

Now comes Edgar C. Chapman, receiver in the above-entitled cause, and respectfully reports unto the Court, that he has made diligent effort under the order made by the Court in this cause on the 23d day of January, 1895, to raise the money authorized by said order, or some part thereof, for the purpose of paying the expenses of managing and caring for the property in his hands as such receiver, but has been, and is unable to raise any money whatever on the choses in action and securities in his hands, and is unable to raise any money upon any of the personal assets in his hands as such receiver; that upon investigation he finds that all of the notes in his hands purport to be secured by mortgage on real estate, but that in each and every case except three, the mortgages given to secure said notes are second or third mortgages upon the property described therein, and that the encumbrances prior to the
61 mortgages so held by the receiver are so great that he is unable to negotiate or hypothecate the security, or any part thereof; that as to the three notes which are secured by first lien upon real estate, they are all made in the year 1894, for small sums, and run for ten years, with interest at six per cent. per annum, and that he is unable to raise any money whatever upon said notes. Said receiver further reports that he is now actually indebted in the sum of about seventeen hundred ($1,700.00) dollars, for work and labor necessarily employed in the care of said property; that all his employees threaten to leave unless promptly paid; that there are about twenty thousand ($20,000.00) dollars of outstanding time certificates given by the defendant corporation for work, labor and material furnished prior to the appointment of this receiver, and that the standing and credit of said defendant is such that men refuse to work, even for this receiver, without prompt payment of their wages, by reason whereof this receiver will be entirely unable to manage and care for the said property, to protect it from damage and loss, or to preserve defendant's title to water rights, unless he can be immediately placed in funds necessary to pay the expenses thereof; that in addition to the amount of indebtedness aforesaid, he has been compelled to, and he and his counsel have made advances for personal expenses, court fees and on account of work and labor aforesaid considerably in excess of all moneys received by him as such receiver; that since the date of his last report, no money has

62 come into his hands as such receiver; that there is nothing outstanding upon which he can make collections; that everything that was available upon which money could be readily realized, had been hypothecated before this receiver was appointed, and that he knows of no source of income from which money can be derived earlier than the month of June or July next.

Wherefore, this receiver again applies to the Court, and prays the Court to grant an order authorizing him to borrow, for the purpose of paying the expenses of caring for and managing the property now in his hands as such receiver, and as necessary expenses as such receiver, such sum of money as to the Court shall seem just, not less than the sum of five thousand ($5,000.00) dollars, and to issue therefor receiver's certificates, which shall be and constitute a first lien upon and preferred claim against the mortgaged property described in the complaint in this cause, to be paid out of the proceeds of any sale made in this cause, or out of any other funds that shall come into the hands of this receiver applicable thereto.

And this receiver will ever pray, etc.

Dated this 30th day of January, 1895.

E. C. CHAPMAN, *Receiver.*

FOX, KELLOGG & GRAY,
Attorneys for Receiver.

63 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Edgar C. Chapman, being duly sworn, deposes and says: That he is the receiver who makes the foregoing report and petition; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge, except as to such matters as are therein stated on his information or belief, and as to those matters he believes the same to be true.

EDGAR C. CHAPMAN.

Subscribed and sworn to before me this 30th day of January, A. D. 1895.

[SEAL.] THOS. E. HAVEN,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed:] Filed Jan. 31, 1895. W. J. Costigan, Clerk. By W. B. Beaizley, Dep. Clerk.

64 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 11950.

ATLANTIC TRUST COMPANY, Plaintiff,
vs.
WOODBRIDGE CANAL AND IRRIGATION COMPANY ET AL., Defendants.

Order Authorizing Receiver to Borrow Money and Issue Receiver's Certificates.

This cause having come on regularly to be heard in its order on the 6th day of February, A. D. 1895, upon the application of Edgar C. Chapman, Esq., receiver heretofore appointed in this cause, for leave to borrow money for the purpose of paying expenses of the care and management of the property which has come into his hands as such receiver and of conducting the business of the same as a going property; and upon due notice given to plaintiff in said cause, and to the defendant, and also to the interveners in said cause, the plaintiff appearing by Page & Eells their attorneys, the defendant appearing by Daniel Titus, its attorney, and the said interveners having appeared by W. M. Cannon, their counsel, and the hearing of said application having been continued from time to time, until this date and the said application having been heard upon the report and petition of said receiver, and upon the evi-
65 dence given in open court, and it appearing to the Court that the said receiver is without funds with which to pay the necessary or any of the necessary expenses incurred or to be incurred by him as such receiver, and that there is no present income from the said property, and that said receiver has been and is unable to raise any money under the order entered in this cause on the 23d day of January, 1895, and that the same is a going property; that the said receiver has already necessarily incurred expenses and thereby created indebtedness for such expenses in the care and management of said property to the amount of about seventeen hundred dollars, and that further expenses of such management and care must be continued from day to day in order to preserve the said property from waste or injury, and it appearing to the court that it is a proper case therefor; and the plaintiff in said cause consenting in open court thereto, the defendant not objecting thereto—

It is by the Court now here ordered, that the said receiver Edgar C. Chapman, be and he is hereby authorized and empowered as such receiver and for the purposes aforesaid, to wit, for the purpose of paying the expenses and indebtedness already incurred by him in the management of said property, and of paying the continuing and accruing expenses of such management, to borrow the sum of five thousand ($5000.00) dollars to be used by him as such receiver for the purposes aforesaid, and to be accounted for to the Court
66 from time to time, and to issue his certificate or certificates therefor, payable out of any funds that may come into his

hands as such receiver applicable thereto, with interest thereon at such rate as he shall find necessary in order to secure such loan, but not to exceed ten per cent. per annum, and that the certificates so issued shall be and constitute a first and prior lien upon all the property described in the mortgage for the foreclosure of which this action is brought, and if not paid prior thereto, then to be paid out of the proceeds of any sale of said property next after the costs of suit and sale, and before the payment of any other sum on account of said mortgage, or the indebtedness secured thereby; and that the said receiver report to this Court from time to time his doing under this order, together with the amount of money which he may have realized thereunder, and his disposition thereof.

Dated this 15th day of February, A. D. 1895.

JOSEPH McKENNA, *Judge.*

[Endorsed:] Filed February 15th, 1895. W. J. Costigan, Clerk.

67 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 11950.

ATLANTIC TRUST COMPANY, Plaintiff,
vs.
WOODBRIDGE CANAL AND IRRIGATION COMPANY ET AL., Defendants.

Notice of Motion for Order of Sale.

Take notice that on Monday, the 24th day of August, 1896, at eleven o'clock A. M. or as soon thereafter as counsel can be heard, at the courtroom of the above-entitled court in the city and county of San Francisco, State of California, the receiver heretofore appointed by the Court in the above-entitled cause, by his counsel, will move the Court for an order authorizing and directing the said receiver to sell at public auction, upon notice thereof duly given, to the highest and best bidder therefor for gold coin of the United States, the dams, canals, ditches, water rights, real property, irrigation works and plant belonging to defendant and covered by the mortgage of plaintiff and now in the possession of said receiver, and out of the proceeds thereof to pay off the unpaid balance of

68 expenses incurred by said receiver in the care and management of the property, together with his compensation and counsel fees to be fixed by the Court, paying the balance of the proceeds of such sale into court to abide the final determination of the Court in this cause and such disposition thereof as the Court shall direct; or for such other order or relief as the Court may direct.

Said motion will be made on the report of said receiver bearing date this day, and a copy of which is herewith served upon you, and on the ground that the same is perishable property, constantly suffering and depreciating in value for want of funds for the proper man-

agement and care thereof, and that in the present condition of the property sufficient funds for such management and care cannot be realized from the income of the property.

Dated this 13th day of August, 1896.

FOX, KELLOGG & GRAY,
Attorneys for Receiver.

To Messrs. Page, Eells & Wheeler, Attorneys for Plaintiff; D. Titus, Esq., Attorney for Defendant; W. M. Cannon, Esq., Attorney for certain interveners; Edward P. Cole, Esq., Attorney for Petitioner, William C. Pidge.

69 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 11950.

ATLANTIC TRUST COMPANY, Plaintiff,
vs.
WOODBRIDGE CANAL AND IRRIGATION COMPANY ET AL., Defendants.

Report of Receiver.

(Filed August 14, 1896.)

To the Honorable, the Justices of the Circuit Court of the United States, of the Ninth Judicial Circuit, Northern District of California:

Now comes E. C. Chapman, receiver appointed by the Court in the above-entitled cause and makes and files this, a partial report of his proceedings as such receiver, for the information of the Court; a more complete, detailed and itemized report of receipts and disbursements will accompany his final report to be made whenever thereunto required.

As shown by my report filed in this cause on the 29th day of December, 1894, I entered upon the discharge of my duties as such receiver immediately upon receiving my appointment and
70 was put in possession of property and assets on the same day.

A detailed statement of the property of which I was so placed in possession accompanies my said report filed December 29th, 1894. Up to that time I had received in cash the total sum of $875.73 and disbursed $903.66, leaving a balance due me on account of disbursements of $27.93 as shown by the statement of account then made. As shown by subsequent reports made to this Court, nearly, if not quite all the bills receivable which came into my hands or of which account was furnished to me with the securities therefor, had been pledged or assigned by the corporation prior to my appointment and I have been able to realize but very little, if any, money on account thereof; nearly all the money which I have since received, has been

realized from water rents for water supplied and the amount has been wholly disproportionate to the expenses necessarily incurred.

At the time I entered upon my duties, I found the large wooden dam of the company located at Woodbridge in a defective condition and was advised by competent engineers that the west abutment thereof needed immediate repairs and accordingly proceeded to make such repairs as advised by such engineers and continued to supply water to the farmers who had secured from the company water rights, until the 23d day of July, 1895, when, without any warning or any means of prevention, the river undermined the easterly portion of the dam and carried away the east abutment thereof. This caused the river to change its channel and flow over the ground formerly occupied by such abutment. The quantity of earth
71 carried away by this change in the course of the stream amounted to some 10,000 cubic yards, which formerly constituted the easterly bank thereof. Nor was this all the damage done. The sheet piling in front of the dam for a distance of 120 feet was completely washed out and many of the heavy timbers supporting the large wooden front apron were displaced.

Prior to that time I had been authorized by the Court to raise money on receiver's certificates to the extent of $5,000, but had been entirely unable to do so without personally guaranteeing the payment of the same. Upon the washing away of this dam, I notified the farmers, patrons of the company, and interceded with them for assisstance in restoring the dam. After considerable communication and some delay ten of them agreed to contribute the sum of $1,500 for the restoration of the dam. I had previously purchased on credit all the lumber, hardware and materials necessary to complete the dam and having obtained this subscription from the farmers I commenced work, and after having carried on the work for two months, most of the farmers failed to pay in their subscriptions. When it became known that the payment of the subscription would not be forthcoming, nearly all of my employees, numbering some thirty, at that time, quit work and two of them undertook to attach all the personal property of the company, including wheelbarrows, shovels, lumber, ropes, tools, implements and appliances necessary for such work. The attaching officer, who had possession of such property, refused to release the same until an order was
72 secured from this Court and served upon him to show cause why he should not be punished for contempt, when he released said property from the attachment. Thereafter, and on or about the 1st of November, after much deliberation and debate, the principal patrons of the company met and agreed to furnish money necessary for the repairs on the dam upon the condition that I should give them receiver's receipts for the money so furnished and that a competent engineer, whom they would name, should be appointed to supervise the work. To this I consented. The engineer who was unanimously selected by the farmers was W. C. Pidge, Esq., a former engineer of the Woodbridge company. Under his direction, and with an additional expense of some $5,000, the dam was finally repaired before the commencement of the winter rains of 1895 and so remained until the 26th day of July, 1896. On

this last-named day the dam was again undermined at the same place where the river broke through the preceding year. It was thought by the engineer in charge, upon the completion of the repairs, that it would be impossible for the river to undermine the dam again, as he claimed that the sheet piling was driven far down into a bed of blue clay which was supposed to form the bed of the river. But the fact that the river undermined the same is proof that his opinion was not correct. The foundation of the dam and the superstructure thereof still stand intact but the sheet piling, by which the water is prevented from flowing through or under the dam, is not sufficient to hold the waters of the river. I am informed by civil engineers that there is a well defined bed of clay in
73 the bed of the river at the place where the dam was constructed, but from my experience with this work of repair and the result thereof, I am led to believe that it is not as good as it should be for such a dam as was constructed, and that hereafter it will be wise to make repairs on the theory that there is no bed of blue clay under the river.

The operating expenses of the ditch thus far amount to about $8,000 and the expenses of repairing the dam, necessary expenses of repairing ditches and canals after the winter rains, cost of repairing bridges, syphons, checks, flumes, supply gates, waste gates, main headgates, drain boxes, culverts and canals, including necessary tools, implements and appliances thereto, so as to keep the property intact and preserve the rights thereto and supply water to those who had already acquired water rights prior to my appointment, amount to about the sum of $12,000, making the aggregate of expenses which have thus far been incurred about $20,000, exclusive of my own traveling expenses and exclusive of any compensation to myself or to my counsel for services or court expenses.

For these expenses so incurred, less the sum of about $1,500, which I have collected from the patrons of the works and used in paying taxes and wages of the employees, leaving a balance of about $18,500, I have issued receiver's certificates to the amount of $5,000 given for the moneys advanced for the repair of the dam as aforesaid, the remaining $13,500 being paid by time checks issued to employees for labor and by cash raised upon my own personal
74 credit and advanced for the purposes aforesaid.

By reason of this last washing away of the dam, farmers, holding water rights for about three thousand acres of land, have been cut off from the use of water at a time when it occasioned a loss of about one-third of their income from their lands for the current year, and unless the dam can be restored before the winter rains, will deprive them of water for the ensuing year; the value of the works and property will be very greatly depreciated and much loss will necessarily occur to all parties interested. I am unable to raise further funds on receiver's certificates. The farmers are not inclined to make further contributions, and the property, if offered for sale, would not, in my judgment, in its present condition, bring anything near its worth, and yet the longer it remains in its present condition, the more it is likely to depreciate. The water of the river has not gone down sufficient as yet to enable us to determine the extent and nature of the repairs necessary to restore the

structure and preserve the efficiency of the works, but in my judgment it will require from $2,000 to $5,000 to accomplish the same.

The care and management of the property during the period of my incumbency has been very much less expensive than it was prior to my appointment, but while the property remains in litigation no advance steps can be made in the way of extending its operations and securing additional income for the use of water, and in my judgment the time has come when, in order to preserve the property,
75 some steps must be taken by the parties interested in the property for supplying funds for its protection, care and repair, or some order of the Court should be made for the final disposition thereof.

E. C. CHAPMAN, *Receiver.*

FOX, KELLOGG & GRAY,
Att'ys for Receiver.

Aug. 13, 1896.

[Endorsed:] Received copy hereof August 13th, 1896. E. P. Cole, per H. K., Daniel Titus, J. J. Scrivner, Geo. W. Schell, Att'ys for Pl'tff. Filed August 14th, 1896. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

76 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 11950.

ATLANTIC TRUST COMPANY, Plaintiff,
vs.
WOODBRIDGE CANAL AND IRRIGATION COMPANY ET AL., Defendants.

Order Authorizing Receiver's Certificates to Issue.

(Filed November 19, 1896.)

A report having been heretofore made on the 13th day of August, 1896, by E. C. Chapman, receiver in the above entitled cause and duly filed therein, whereon an order was issued by the Court to show cause why the property of the defendant in the above-entitled cause, now in the hands of said receiver, should not be sold and the proceeds thereof applied in satisfaction of the costs and expenses incurred by said receiver in the care and management of said property and the balance thereof be paid into court to abide the final judgment of the Court in said cause and its final order for the distribution thereof, or for such other or different order as to the Court shall seem just and proper in the premises; and the hearing upon said order having been continued from time to time at the request
77 of plaintiff; and it appearing from the report so made that receiver's certificates have been heretofore issued in said cause under and by virtue of an order of this Court authorizing the same to the extent named in said order, to wit, to the amount of five thousand ($5,000) dollars, and that other and further funds are

necessary for the payment of expenses necessarily incurred in the management and care of said property and of taxes thereon, and the said plaintiff now consenting thereto—

It is by the Court now here ordered that the said E. C. Chapman, receiver, be and he is hereby authorized to make and issue receiver's certificates to the further amount of twenty-five hundred ($2,500) dollars to run for such period of time as he shall deem necessary and to bear interest at such rate as he shall find necessary in order to raise moneys thereon, not to exceed ten per cent. per annum; such receiver's certificates, together with those already heretofore issued as aforesaid to constitute a first lien on the property of said defendant held by said receiver, payable out of the first moneys received from the sale of said property, and the same or the proceeds thereof to be used by said receiver for the payment of taxes upon said property and of the current and necessary expenses for the management and care thereof.

Dated this 19th day of November, 1896.

JOSEPH McKENNA, *Judge*.

[Endorsed:] Filed November 19th, 1896. W. J. Costigan, Clerk.

78 In the United States Circuit Court, Ninth Judicial Circuit, Northern District of California. In Equity.

THE ATLANTIC TRUST COMPANY (a Corporation), as Trustee of the Trusts Created by the Mortgage in this Complaint Described, Complainant,

vs.

THE WOODBRIDGE CANAL AND IRRIGATION COMPANY (a Corporation), Respondent.

Amended Bill of Complaint.

To the Justices of the Circuit Court of the United States, for the Northern District of California:

The Atlantic Trust Company, of the city of New York and citizen of the State of New York, brings this its amended bill against the Woodbridge Canal and Irrigation Company, of San Francisco and a citizen of the State of California, and thereupon your orator complains and says:

I.

That at all the times in this complaint mentioned the plaintiff The Atlantic Trust Company was and now is a corporation, organized and existing under and by virtue of the laws of the State of New
79 York, having its principal place of business in the city and county of New York, in said State, and being formed and incorporated for the purpose and with the express powers of accepting, holding and managing trusts and trust properties.

That at all of said times, The Woodbridge Canal and Irrigation Company was and now is a corporation, duly organized and existing

under and by virtue of the laws of the State of California, having its principal place of business in the city and county of San Francisco, in said State and was formed for the purpose and with the powers of owning and operating an irrigating canal in the county of San Joaquin, in said State of California.

That said defendant is a citizen and resident of the Northern Judicial District of said State of California, and that this plaintiff is a citizen and resident of the Southern Judicial District of the State of New York.

II.

That heretofore, to wit, on or about the 17th day of July, 1891, at said city and county of San Francisco, the said Woodbridge Canal and Irrigation Company made and executed one hundred (100) bonds, numbered from one (1) to one hundred (100), both numbers inclusive, each of which said bonds was in the words and figures following, to wit:

80 "UNITED STATES OF AMERICA, *State of California.*

No. ——. $1000.

First Mortgage Convertible Gold Bond of the Woodbridge Canal and Irrigation Company.

The Woodbridge Canal and Irrigation Company, a corporation duly organized under the laws of the State of California, acknowledges itself indebted to the bearer, or to the registered owner thereof, in the sum of one thousand dollars, which it promises to pay in the gold coin of the United States of America, of the present weight and fineness, on the first day of September, in the year nineteen hundred and one, at the office of the Atlantic Trust Company, in the City of New York, with interest thereon, at the rate of six per centum per annum, payable semi-annually, at the same place, upon presentation and surrender of the coupons hereto annexed, on the first day of March and September in each year, as they respectively become payable, so long as the principal remains unpaid.

This bond is one of a series of one hundred bonds, of similar amount, tenor and date, which are secured by a mortgage or deed of trust, bearing date this day, executed and delivered by the Woodbridge Canal and Irrigation Company to the Atlantic Trust Company, as Trustee, conveying and assigning to the said Trustee all its corporate property and franchises now owned or hereafter acquired.

81 Any lawful holder of this bond, upon presenting the same at the office of the said Trustee, with all unmatured coupons attached thereto, may have the same registered in his own name, or that of any other person, in a book to be kept for that purpose, and such name, with the date of registry, shall be endorsed upon the bond by the said Trustee. From the date of such registry until, by a like endorsement, it be again made payable to bearer, such bond

shall be transferable only by a written transfer thereof on the books of the Trustee, such transfer, and the date thereof, to be in like manner endorsed upon the bond, and while so registered, all payments becoming due thereon, either for principal or interest, shall be paid only to such registered owner or to his order. Successive registration and transfers to bearer may be made at the option of any lawful holder and owner of this bond.

It is expressly agreed that in case default shall be made in the payment of any semi-annual installment of interest on the day whereon the same shall fall due, as herein provided, or in the performance of certain covenants contained in said mortgage or deed of trust, and should default in any of such cases continue for the space of six months, then, and in either of such cases, the principal sum herein mentioned may, as in said mortgage or deed of trust provided, immediately become due and payable, anything herein contained to the contrary notwithstanding.

At any time between the first day of July, 1894, and the first day of January, 1895, this bond, upon presentation and
82 surrender thereof, to the said Trustee, with all unmatured coupons attached, may, at the holder's option, be converted into the capital stock of this Company at par, and the holder in such case shall be entitled to receive in payment of this bond one thousand shares of said capital stock of one dollar each, said stock being reserved in the treasury of the Company for that purpose.

This bond is also entitled to the benefits of the Sinking Fund in said mortgage or deed of trust provided for. The holder of this bond, by acceptance thereof, hereby waives any personal claim or demand against the stock-holders of said Company, for the indebtedness incurred hereby.

This bond shall not become valid or obligatory until the certificate endorsed hereon shall have been duly signed by or in behalf of the said Atlantic Trust Company as Trustee.

In witness whereof, the Woodbridge Canal and Irrigation Company has caused these presents to be sealed with its corporate seal, and to be signed by its President and attested by its Secretary, and the annexed coupons to be executed with the engraved signature of its Secretary, this — day of ——, one thousand eight hundred and ninety-one.

—— ——, *President.*

Attest:

—— ——, *Secretary.*"

That each of said one hundred bonds was in the words and figures above set forth, except that each was severally numbered
83 as aforesaid, and that to each of said bonds were attached twenty (20) interest coupons, likewise executed by the Woodbridge Canal and Irrigation Company, each of which coupons was in the words and figures following, to wit:

"30.

"On the first day of ——, 18—, the Woodbridge Canal and Irrigation Company will pay, at the office of the Atlantic Trust Company, in the City of New York, upon presentation and surrender of this coupon, to the bearer, or to the registered owner thereof, thirty dollars in United States gold coin for six months' interest then due on Bond No. —.

—— ——, *Secretary.*"

That the blanks in said twenty (20) coupons attached to each bond were so filled out as to bear the number of the bond to which they were attached and to fix the date of payment of each coupon so that they should consecutively fall due, one on the first day of September and one on the first day of March of each year, beginning March 1st, 1891, and ending September 1st, 1901.

That each of said bonds when so executed, as aforesaid, bore endorsed thereon the following certificate, signed by the complainant:

"The Atlantic Trust Company hereby certifies that the within bond is one of the bonds issued under and in pursuance of a certain mortgage or deed of trust, dated ——, and duly executed
84 and delivered to said Company, as Trustee, by the Woodbridge Canal and Irrigation Company.

THE ATLANTIC TRUST COMPANY,
By W. H. MALE, *President.*"

That sixty-six (66) of said one hundred (100) bonds, with said relative coupons attached thereto, when so executed were by the said Woodbridge Canal and Irrigation Company, duly issued, sold and delivered to purchasers thereof prior to September 1st, 1891, for money actually paid to it for the same.

That no more or none other of the said one hundred (100) bonds than the said sixty-six (66) have ever been sold by the said Woodbridge Canal and Irrigation Company, and that said Company is still the owner of the remaining thirty-four of said bonds.

III.

That on or about the 17th day of July, 1891, and in order to secure the payment of the said sixty-six (66) bonds so sold and delivered, the said Woodbridge Canal and Irrigation Company executed and delivered to this plaintiff as Trustee of the trusts thereby created, its certain indenture of mortgage, dated July 17, 1891, and executed in its corporate name by M. V. B. Watson, as its president, and by M. T. Moses, as its secretary, and to which mortgage was affixed its corporate seal.

That said mortgage was further, on or about the day on which it bears date, signed and executed by this plaintiff in accept-
85 ance of the trusts thereby created and imposed upon this plaintiff.

That said mortgage was duly acknowledged, so as to entitle it to be recorded, and it was recorded on the 10th day of August, 1891,

in book "A" of Deeds, volume 74, page 361, in the county recorder's office of the county of San Joaquin, State of California.

That a copy of said mortgage is hereto attached, marked Exhibit "A," and is here referred to and made part of this complaint.

That in and by said mortgage the said Woodbridge Canal and Irrigation Company did mortgage to this complainant, as Trustee, to secure the payment of the aforesaid bonds, the entire corporation property of said Woodbridge Canal and Irrigation Company, and all its lands, tenements, hereditaments, privileges, franchises, rights of way, flowage and riparian rights, easements and fixtures, then owned or thereafter to be acquired by it, and all its canals, flumes, headworks, gates, dams, and bridges, then constructed or to be thereafter constructed, extending from the point of division in the Mokelumne river, in the town of Woodbridge, in San Joaquin County aforesaid, in a westerly direction to Taison and New Hope, in said county, and in an easterly and southerly direction to the Calaveras river, with all other or branch canals that might be thereafter constructed within said territory south and west of the Mokelumne river; and all the estate, right, title and interest, claims and demands, rights of way and other easements, whether at law or in equity, of the said
86 Canal Company, of, in and to the same; and also all buildings, fixtures and personal property thereon or belonging to said canal company; and all receipts, incomes and profits which said company shall derive on account of any contract or agreement for the transfer of water rights as appurtenant to specified lands, excepting the annual rentals for the use of said water and interest endorsed on such contracts or agreements.

IV.

That on said 17th day of July, 1891, and at the time of the execution of the said bonds and the said mortgage M. V. B. Watson was the president and M. T. Moses was the secretary of the said Woodbridge Canal and Irrigation Company, and as such president and secretary they were duly and fully authorized and empowered to execute the said bonds and mortgage, in the name and as the act of the said Woodbridge Canal and Irrigation Company, and to attach to said bonds and mortgage its corporate name and to affix thereto its corporate seal, by resolution adopted by the vote of the holders of more than two-thirds of its capital stock at a meeting of its stockholders, duly and regularly called, notified, organized and held at the office of the Woodbridge Canal and Irrigation Company in the city and county of San Francisco, State of California, on the 11th day of July, 1891; and said president and secretary were further authorized to so execute said bonds and mortgage by resolution of the board of directors of the said Woodbridge Canal and Irrigation Company, duly passed and adopted.

87 V.

That since the execution of said mortgage the Woodbridge Canal and Irrigation Company has constructed and now owns an irrigating

canal in the county of San Joaquin, State of California beginning at a dam in the Mokelumne river, in the town of Woodbridge, in the southeast quarter (¼) of section thirty-four (34), in township four (4) north of range six (6) east, Mount Diablo base and meridian, and running thence through said section thirty-four (34) and through and across portions of sections three (3), ten (10), eleven (11), fourteen (14), twenty-three (23), twenty-six (26), thirty-five (35), and thirty-six (36), in township three (3), north of range six (6) east, and through and across portions of sections one (1), twelve (12), and thirteen (13), in township two (2) north of range six (6) east; and also through and across section eighteen (18), in township two (2) north of range seven (7) east, and following the line of division between subdivisions fifty-one (51) and sixty-one (61) of El Rancho Del Campo De Los Franceses.

That the said Woodbridge Canal and Irrigation Company has likewise constructed and now owns and is operating sundry branch or lateral canals, diverting from said main canal above referred to, in a general westerly direction and irrigating the lands along their course.

That the Woodbridge Canal and Irrigation Company, since the execution of said mortgage, has likewise acquired and now owns various other lands and properties, contracts and mortgages in said county of San Joaquin and in the Northern District of the
88 State of California, a list of which properties is hereto appended, marked Exhibit "B," and is here referred to and made part of this complaint.

VI.

That no part of the principal sum mentioned in any of said sixty-six (66) bonds has ever been paid, and no part of the interest upon said bonds, which, by the terms thereof and of the coupons attached thereto, became due and payable on the first day of September, 1894, has ever been paid, nor has any money for the purpose of paying said September interest ever been paid or tendered to this complainant.

That on or about the first day of September, 1894, the holders of fifty-five (55) of said bonds, which had been so sold as aforesaid, by the Woodbridge Canal and Irrigation Company, did present, at the office of this complainant, in the city of New York the fifty-five (55) several coupons attached to said bonds and then, on said day, falling due as aforesaid according to their terms, and did demand from this complainant payment thereof; that none of said coupons, nor any part of the money due thereon, was then paid by this complainant, or by any one; nor has any part of said money due on said coupons ever been paid by this complainant, or by any one; and complainant avers that thereby, on said first day of September, 1894, default was made by the said Woodbridge Canal and Irrigation Company in the payment of the said installment of interest upon said bonds.

That at a special meeting of the board of directors of the
89 Woodbridge Canal and Irrigation Company, held at its office in the city and county of San Francisco on the first day of

October, 1894, a resolution was unanimously adopted, declaring that said Woodbridge Canal and Irrigation Company was then unable, and would continue to be unable to pay at any time within the ensuing six months, that is to say, prior to April 1st, 1895, any of this indebtedness or any of the interest upon the said bonds; and further providing that it waived all conditions and provisions specified or provided in Article Fifth of the said mortgage, Exhibit "A" hereof, as conditions precedent to the enforcement of the lien created by said mortgage; and in and by said resolution this complainant was authorized and requested to immediately commence this action for the foreclosure of the said mortgage, and to enforce the payment of the principal and interest of the said bonds.

That on the 2d day of October, 1894, and prior to the commencement of this action, the owners and holders of fifty-five (55) of the said sixty-six (66) bonds then outstanding did request, in writing, this complainant to commence this action, and did, in writing, express their election and option that the whole principal sum mentioned in each and all of the mortgage bonds then outstanding shall forthwith become due and payable.

VII.

That the said canal is in the receipt of an income from the sale and rentals of water and must be operated as a whole, and kept in repair and under one management, or it will be entirely lost, and all water rights and franchises possessed by the said canal company will be forfeited from non-user, and said franchises will be forfeited and annulled and the value of said canals destroyed in case the diversion and distribution of water thereby is suspended or discontinued.

That, therefore, the appointment of a receiver of said property, with power to control and manage the said canals and all of them, is necessary for the protection of said bondholders, by this Court in this proceeding.

VIII.

Your orator further says, that it has been compelled to employ counsel to prosecute this proceeding to foreclose the said mortgage, and that it has employed John B. Hall, Esq., of Stockton, California, and J. J. Scrivner, Esq., and Geo. W. Schell, Esq., of San Francisco, in said State, as its solicitors, attorneys and counselors in this cause to prosecute the same, and that ten thousand ($10,000) dollars would, as your orator believes, be a reasonable counsel fee for said solicitors as their compensation for their services on behalf of your orator.

IX.

And your orator further avers that, it verily believes that it would be for the interest of the said Woodbridge Canal and Irrigation Company, and of the purchasers and owners of said sixty-six (66) bonds, that they be permitted to become purchasers of the property described in said trust deed, and that they be permitted to pay the amount of any bid that they might make in the bonds held by them *pro tanto*.

91 Wherefore, your orator prays:

1. That this Honorable Court, upon the filing of this complaint, appoint some suitable person a receiver in this action, to take charge of the said mortgaged property and to maintain and operate said canals, pending this action and until final sale under any judgment of foreclosure herein, under the directions of this Court, and with such powers and authority as this Court, by its order, may from time to time confer upon him.

2. That it be determined by the decree of this Honorable Court that said sixty-six (66) bonds hereinbefore mentioned, were legally and lawfully issued and sold, and that the same are now outstanding and unpaid, and that said Court declare and adjudge that the entire principal sum of said sixty-six (66) bonds so issued and sold, is unpaid, due and payable; and that said Court further, by its said decree, fix and determine the amount of money due for principal and interest upon said bonds and enter judgment therefor against the said Woodbridge Canal and Irrigation Company in favor of your orator, as trustee for said holders of said sixty-six (66) bonds, and that this Court further by its decree, ascertain, fix and determine a reasonable and suitable attorney's fee for payment of the services of your orator's attorneys in this action; and further fix and determine the amount to be paid your orator as compensation for its services as such trustee, and that your orator have judgment against the said Woodbridge Canal and Irrigation Company for the amount found due for principal and interest upon said sixty-six (66)

92 bonds—for said attorney's fee, and the amount due your orator for its services as trustee herein, and costs and expenses of this action.

3. That further by said decree, this Court shall order all of said franchises, canals, lands, and other mortgaged premises and property, to be sold by the marshal of the said Northern Judicial District of the State of California, at public auction, in accordance with law and with the course and practice of this Honorable Court; that the proceeds of said sale may be applied in the payment of the expenses of sale and of the costs in this action; and of said trustee's commissions, and counsel fees, and in the payment of the amount found due by this Honorable Court upon said outstanding bonds to the persons holding the same; that said defendant, and all persons claiming, or to claim by, through or under it, subsequent to the execution of said mortgage, either as purchasers, encumbrancers or otherwise, may be barred and foreclosed of all right, title, claim or equity of redemption, in the said mortgaged property and premises, and every part thereof. That the complainant, or any other party to this suit, or any bondholder, may become a purchaser at such sale; that the marshal execute deeds to the purchaser or purchasers, and that said purchasers be let into the possession of the property bought by them, on production of such deed; and that it be further adjudged and decreed that any of said bondholders may be purchasers of said property or any portion thereof, and that they may be permitted to pay for the property so purchased by them in

93 the bonds held by such purchasers *pro tanto*, and that such other and further relief may be by decree given in the premises as to this Court shall seem meet and agreeable to equity.

And may it please your Honor to grant unto this complainant a writ of subpœna of the United States of America, issuing out of and under the seal of this Honorable Court, directed to the said respondent, the Woodbridge Canal and Irrigation Company, therein commanding it on a day certain to be named and under a certain penalty, to be and appear before this Honorable Court, then and there to answer (but not under oath) all and singular the premises, and to stand to, perform and abide by the said order, direction and decree, as may be made against it in the premises, as shall seem meet and agreeable to equity and good conscience.

And the complainant, as in duty bound, will ever pray, etc.

JOHN B. HALL AND
SCRIVNER & SCHELL,
Solicitors for Complainant.

UNITED STATES OF AMERICA,
State of California, City and County of San Francisco, ss:

J. J. Scrivner, being duly sworn, deposes and says: That he is one of the solicitors for the complainant, the Atlantic Trust Company, in said action, and makes this affidavit on its behalf; that said complainant has no officer or other agent in the State of Cali-
94 fornia; that he has read the foregoing amended bill of complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters that he believes it to be true.

J. J. SCRIVNER.

Subscribed and sworn to before me, this 14th day of December, 1895.

[SEAL.] E. M. MORGAN,
Notary Public.

EXHIBIT "A."

This indenture, made the — day of July, one thousand eight hundred and ninety-one, between the Woodbridge Canal and Irrigation Company, a corporation duly created and organized under the laws of the State of California, and having its principal place of business in the City and County of San Francisco, in said State, and the location of its works in the County of San Joaquin in said State (hereinafter called "the Company"), party of the first part, and the Atlantic Trust Company, a corporation duly organized and existing under the laws of the State of New York, and doing business in the City of New York, as Trustee (hereinafter called "the Trustee"), party of the second part, witnesseth:

That whereas, the said Company is now the lawful owner of a certain irrigating canal, flume and headworks in the county of San Joaquin aforesaid, and of various lands, tenements, hereditaments,

privileges, franchises, rights of way, water rights and other
95 easements, contracts, fixtures and property thereunto appertaining, and hereinafter more particularly described, conveyed and assigned:

And whereas, the Company is desirous of fully completing and equipping the said canal and headworks of the Mokelumne River, in accordance with the plan of its Chief Engineer, so as to enable said Company to furnish water for the thorough and complete irrigation of about one hundred thousand acres of farming land, lying south and west of the said river, in said San Joaquin County;

And whereas, for the purpose of securing money for the objects aforesaid, and for the maintenance and operation of the said canal, and for the payment of said Company's existing indebtedness and the general transaction of its business, the said Company desires to borrow the sum of one hundred thousand dollars;

And whereas, at a special meeting of the stockholders of said Company, duly called and held for that purpose on the 11th day of July, 1891, at the office of the Company, in the City of San Francisco, and State of California, it was duly resolved, by a vote of more than two-thirds in interest of said stockholders that the said Company be authorized to borrow said sum and to issue its bonds as hereinafter described, for said amount, and to execute its mortgage, or deed of trust, to secure the same, as may more fully appear by a reference to the said resolution entered upon the minutes of the Company.

96 And whereas, the said Company, to that end, is about to execute and to place in the hands of the said Trustee, to be issued, certified and delivered, as shall be directed by resolution of the Board of Directors of said Company, its one hundred corporate bonds of one thousand dollars each, numbered consecutively from one to one hundred, both inclusive, with semi-annual coupons or interest warrants attached, and with certificates to be signed by the said Trustee, all of which bonds, coupons and certificates are in the following form, that is to say.

(*Form of Bonds.*)

"UNITED STATES OF AMERICA, *State of California.*

No. ——. $1000.

First Mortgage Convertible Gold Bond of the Woodbridge Canal and Irrigation Company.

The Woodbridge Canal and Irrigation Company, a corporation, duly organized under the laws of the State of California, acknowledges itself indebted to the bearer, or to the registered owner thereof, in the sum of one thousand dollars, which it promises to pay in the gold coin of the United States of America, of the present weight and fineness, on the first day of September, in the year nineteen hundred

and one, at the office of the Atlantic Trust Company, in the City of New York, with interest thereon, at the rate of six per centum
97 per annum, payable semi-annually, at the same place, upon presentation and surrender of the coupons hereto annexed, on the first day of March and September in each year, as they respectively become payable, so long as the principal remains unpaid.

This bond is one of a series of one hundred bonds, of similar amount, tenor and date, which are secured by a mortgage or deed of trust, bearing date this day, executed and delivered by the Woodbridge Canal and Irrigation Company to the Atlantic Trust Company, as Trustee, conveying and assigning to the said Trustee all its corporate property and franchises now owned or hereafter required.

Any lawful holder of this bond, upon presenting the same at the office of the said Trustee, with all unmatured coupons attached thereto, may have the same registered in his own name, or that of any other person, in a book to be kept for that purpose, and such name, with the date of registry, shall be endorsed upon the bond by the said Trustee. From the date of such registry until, by a like endorsement, it be again made payable to bearer, such bond shall be transferable only by a written transfer on the books of the Trustee, such transfer, and the date thereof, to be in like manner endorsed upon the bond, and while so registered, all payments becoming due thereon, either for principal or interest, shall be paid only to such registered owner or to his order. Successive registration and transfers to bearer may be made at the option of any lawful holder and owner of this bond.

98 It is expressly agreed that in case default shall be made in the payment of any semi-annual installment of interest on the day whereon the same shall fall due, as herein provided, or in the performance of certain covenants contained in said mortgage or deed of trust, and should default in any of such cases continue for the space of six months, then, and in either, of such cases, the principal sum herein mentioned may, as in said mortgage or deed of trust provided, immediately become due and payable, anything herein contained to the contrary notwithstanding.

At any time between the first day of July, 1894, and the first day of January, 1895, this bond, upon presentation and surrender thereof, to the said company, with all unmatured coupons attached, may, at the holder's option, be converted into the capital stock of this company at par, and the holder in such case shall be entitled to receive in payment of this bond one thousand shares of said capital stock of one dollar each, said stock being reserved in the treasury of the company for that purpose.

This bond is also entitled to the benefits of the Sinking Fund in said mortgage or deed of trust provided for. The holder of this bond, by acceptance thereof, hereby waives any personal claim or demand against the stockholders of said Company, for the indebtedness incurred hereby.

This bond shall not become valid or obligatory until the certifi-

cate endorsed hereon shall have been duly signed by or in
99 behalf of said Atlantic Trust Company as Trustee.

In witness whereof, the Woodbridge Canal and Irrigation Company has caused these presents to be sealed, with its corporate seal, and to be signed by its president and attested by its secretary, and the annexed coupons to be executed with the engraved signature of its secretary, this — day of ——, one thousand eight hundred and ninety-one.

—— ——, *President.*

Attest:

—— ——, *Secretary.*"

(*Form of Coupon.*)

$30.

On the first day of ——, 18—, the Woodbridge Canal and Irrigation Company will pay, at the office of the Atlantic Trust Company, in the City of New York, upon presentation and surrender of this coupon, to the bearer, or to the registered owner hereof, thirty dollars in United States gold coin for six months' interest then due on Bond No. ——.

—— ——, *Secretary.*

(*Form of Trustee's Certificate.*)

The Atlantic Trust Company hereby certifies that the within bond is one of the bonds issued under and in pursuance of a certain mortgage or deed of trust, dated ——, and duly executed and de-
100 livered to said Company, as Trustee, by the Woodbridge Canal and Irrigation Company.

THE ATLANTIC TRUST COMPANY,
By —— ——, *President.*

Now, therefore, this indenture witnesseth, that for the purpose of securing the said bonds for $100,000, to be issued as herein provided for, and the interest thereon, according to the true intent and meaning thereof, and also for and in consideration of the premises, and of ten dollars to it in hand paid by the said trustee, at or before the execution and delivery of these presents receipt whereof is hereby acknowledged, the said Woodbridge Canal and Irrigation Company has bargained, sold, granted, conveyed, assigned, and set over, and by these presents does bargain, sell, grant, convey, assign and set over unto the said Atlantic Trust Company, as Trustee, its successors and assigns, the entire corporate property of said Woodbridge Canal and Irrigation Company, and all its lands, tenements, hereditaments, privileges, franchises, rights of way, flowage and riparian rights easements, and fixtures now owned or hereafter to be acquired, and all its canals, flumes, headworks, gates, dams, bridges, etc., now constructed or to be hereafter constructed, extending from the present point of diversion, in the Mokelumne River, in the town of Wood-

bridge, in San Joaquin County afresaid, in a westerly di-
101 rection, to Taison and New Hope, in said county, and in an easterly and southerly direction to the Calaveras River, with all or branch canals that may be hereafter constructed within said territory, south and west of the Mokelumne River, and all the estate, right, title and interest, claims and demands, rights of way, and other easements, whether at law or in equity, of the said Company of, in and to the same, and each and every part and parcel thereof; and also all buildings, fixtures and personal property thereon, or belonging to said Company, and all receipts, incomes and profits which said Company shall derive on account of any contract or agreement for the transfer of water rights, as appurtenant to specified lands, excepting and not including the annual rentals for the use of said water and interest on such contracts or agreements.

To have and to hold the above-granted premises and property with the appurtenances, unto the said Trustee, its successors and assigns, in trust and upon the trusts, uses and purposes hereinafter expressed of and concerning the same, for the use and benefit of any and all persons or corporations, who shall hereafter at any time become the purchasers, holders or owners of any of said bonds, subject to the terms, provisions and stipulations in said bonds contained, and also subject to the possession and management of said canal system and property by said company, its successors, assigns or lessees, so long as no default shall be made in the payment of either interest or principal of said bonds, as herein provided, and so long as the said company shall well and truly observe, keep and perform
102 all and singular the covenants, agreements, conditions, and stipulations in said bonds and in this indenture, contained and set forth, and which are to be observed, kept and performed by and on the part of said company.

Article First.

It is further agreed that the company, with the consent in writing of the trustee or its successor or successors, may sell and convey any lands or other property herein mortgaged and not necessary or required to be retained for the convenience and use of the Company, and that the proceeds of said sales whenever they amount to the sum of one thousand dollars, or more, shall be applied to the purchase and cancellation of one or more of said mortgage bonds, as hereinafter provided for, or of any lien which may be a prior lien upon the premises mortgaged. And the trustee shall then be authorized to release the land or other property thus sold and conveyed from this mortgage; or in lieu of purchasing and canceling said bonds, the proceeds of said sale may be invested under the sanction and with the approval of the trustee, in the purchase of other property, real or personal, required for use by said Company, which said other property shall be deemed as embraced in, and covered by, this mortgage.

Article Second.

It is further mutually agreed, that until the 1st day of January, 1895, unless sooner exchanged in payment of bonds as herein pro-

vided for, the Company will reserve in its treasury one hun-
103 dred thousand shares of the capital stock of this company of the par value of one hundred thousand dollars, being the increase thereof duly authorized by the stockholders of said company at a meeting held and called for that purpose on the 11th day of July, 1891.

At any time between the 1st day of July, 1894, and the 1st day of January, 1895, upon the presentation and surrender to the company of one or more of the bonds herein provided for, together with all the unmatured coupons thereto attached, the company will deliver to the person or persons so surrendering said bonds in full payment therefor, a certificate or certificates representing one thousand shares of said capital stock so reserved for each bond of the face value of $1,000, and all unmatured coupons annexed, and all bonds surrendered shall be forthwith canceled.

Article Third.

It is further mutually agreed that all moneys received by the company on account of any contract or agreement, now executed or hereafter to be executed, for the transfer of water rights as appurtenant to specified lands, excepting interest on such contracts or agreements, and rentals as the same accrue and are received, to the amount of the bonds sold and delivered, shall be paid by the company to the said trustee, to be held by the trustee as a sinking fund for the redemption of the bonds herein provided for. And whenever and as often as the sum of five thousand dollars or more
104 shall be held by the said trustee in said sinking fund, the trustee shall, whenever requested in writing by the company, forthwith give notice by publication in a newspaper, published in the city of New York, and a newspaper published in the city of San Francisco, for such time as it may deem advisable, that it will purchase and redeem out of said sinking fund, after deducting the expenses of said publication, bonds to the extent of the cash available in said fund, at a price not exceeding par and accrued interest. And such bonds as may be purchased and redeemed by the trustee shall be forthwith canceled; and should none be offered, the trustee shall retain the moneys in said sinking fund at interest, until another like sum of five thousand dollars shall be paid into said fund, in which case the same proceedings shall be again taken as above set forth.

Article Fourth.

The company covenants and agrees to use the bonds herein provided for the following purposes only:

To provide funds to extend and thoroughly complete, equip and maintain the canal and its branches; to erect a dam or dams in the Mokelumne River, and maintain the same; to pay and discharge the floating debt of said Company, and to provide the necessary funds for the general expenses of the Company.

And the Trustee shall, from time to time, upon the joint order of the President and Secretary of the Company, making request therefor, issue and deliver to the persons named in said order, the bonds, or any of them herein provided for.

105

Article Fifth.

And the Company does hereby covenant, promise, and agree for itself, its successors and assigns, to and with the Trustee, and its successor or successors, that the said Company will well and truly pay each and every of said bonds issued by it and secured by this mortgage, together with the semi-annual interest, at the rate of six per cent. per annum, at the times, in the manner, and at the places specified therein, without deduction for any cause.

And in case the Company shall, for the space of six months, make default in payment of said semi-annual interest to become due on any, either, or the whole of said mortgage bonds, then after the expiration of said six months from the time it became due, and without demand or notice, at the election or option of the majority in interest of the holders of said bonds then issued and outstanding expressed in writing, the whole principal sum mentioned in each and all of said mortgage bonds then outstanding, shall forthwith become due and payable, and the lien and encumbrance hereby created for the security and payment thereof may at once be enforced.

Article Sixth.

It is further agreed in case of default in the payment of the semi-annual interest of the said bonds for the space of six months, or of any tax or assessment for the same period, that the Trustee and its successors are hereby expressly authorized and empowered,

106 upon the request in writing of the owners or holders of the majority of said bonds, then outstanding, or if the principal of the bonds shall be due, upon the request of the holders of a majority of the bonds outstanding, to enter into and upon, and to take actual possession of all the property, real and personal, and rights, franchises and privileges of the premises hereby conveyed, and each and every part thereof, and by themselves, or by their attorneys or agents, have, hold, use and enjoy the same, and from time to time make all repairs and replacements, and all useful alterations, additions and improvements thereto, as fully as the Company might have done before such entry, and to collect and receive all tolls, incomes, rent, issues and profits of the same and of every part thereof. The Trustee and its successor or successors shall and may, and hereby are expressly authorized and empowered on such default to sell at public auction, to the highest bidder, the entire property, real and personal, rights, franchises and privileges herein conveyed. Said sale shall be held either in the City of Stockton, or the City of San Francisco. At least two months' notice shall be given of the time, place and terms of said sale, by advertising the same in one or more newspapers of good circulation, in the city of San Francisco, and wherever else required by law, and continuing such advertisement at least once a week, until the time for sale; and that the Trustee may, at its discretion, adjourn said sale from time to time, giving reasonable notice of the time and place where it will take place, and as the attorney

or attorneys in fact of the Company, or its successors and as-
107 signs, shall have full power and authority to make, execute and deliver to the purchaser or purchasers thereof good, valid and sufficient deed or deeds of conveyance or conveyances, assignments or transfers, in fee simple or otherwise, of the entire property herein conveyed, and all the rights, franchises and privileges of the Company, or its successors or assigns, which conveyance or conveyances, transfer or deeds, shall vest in the purchaser or purchasers all the right, title, interest and estate whatsoever, reversionary, or in possession, or which they may be entitled to receive, have or hold of the Company; and said sale shall be a complete and perpetual bar or estoppel, both in law and in equity, against the Company, its successors and assigns, and all persons or parties lawfully claiming by, from or under it or them, in anywise or manner whatsoever; and the said Company hereby covenants and agrees to waive, and expressly covenants and agrees that neither this Company, nor its successors, shall have, or claim any advantage of any valuation, appraisement or extension.

The amount of the purchase money on said sales may be paid and satisfied in whole or in part by the outstanding mortgage bonds, and matured and unpaid coupons, or any of them secured hereby; and said bonds and coupons shall be received in whole or part payment and satisfaction by the Trustee, its successor or successors, according to their value, to be ascertained and determined by the net amount arising from such sale, provided, however, that if dur-
ing the pendency of such proceedings or of any foreclosure
108 proceedings for nonpayment of interest coupons, the said interest be paid, together with the expenses of the legal proceedings then taken, all foreclosure or other proceedings shall then terminate and be discontinued.

Article Seventh.

Out of the moneys received from any tolls, income, rents, profits and earnings of said canal and premises, or out of the proceeds of said sale, so to be made as aforesaid, or the sinking fund above provided for, after first deducting the expenses, disbursements, costs, charges, and counsel fees, incurred in and about the conducting of said sale, or the working and operating said canal, including the compensation and commission of said Trusee in and about the execution of this trust, and all expenses of repairs, replacements, alterations, additions and improvements, and all payments for taxes, assessments, charges or liens on said premises, or any part thereof, the Trustee shall, if the amount be sufficient for that purpose, pay said mortgage bonds, or so many of them as shall be outstanding and unpaid, together with all interest then due upon the same; and if the amount be insufficient, then it shall divide the same pro rata among the outstanding bonds, and the surplus of all such moneys or proceeds of sale, if any there be, shall be paid to the Company, or its successors or assigns.

109 Article Eighth.

Nothing herein shall be construed as limiting the right of the Trustee to apply to any competent Court for a decree of foreclosure and sale under this indenture, or for the usual relief in such proceedings, and the said Trustee, or its successor, may, in its discretion, so proceed.

Article Ninth.

The said Trustee shall be entitled to a reasonable compensation for its services rendered under the trusts herein created, and also to reimbursement for all expenses, legal or otherwise, necessarily incurred by it in administering the same, and all such compensation and expenses, are secured hereby.

In case it shall be required by the holders of bonds secured by this indenture to enforce any of their rights hereby secured, the said Trustee shall not be required to incur any expense or liability in connection therewith, until satisfactorily indemnified therefor, and all powers in these presents conferred upon the Trustee (except as otherwise herein specifically provided) shall be deemed discretionary, and it shall incur no liability in exercising or declining to exercise such discretionary powers, provided it acts in good faith in regard thereto.

Article Tenth.

And it is further agreed that the Trustee, or its successor, may appoint and employ, at the expense of the said Company, all such attorneys or other agents, as may be necessary in the execu-
110 tion of any of the trusts herein declared, and shall not be answerable for the defaults or other misconduct or neglect of such attorneys, or other agents, unless chargeable with culpable negligence in their selection.

Article Eleventh.

And it is further agreed, that in case of the death, removal, resignation, incapacity or insolvency of the Trustee or its successor, or in case two-thirds in interest of the holders of outstanding bonds at any time so elect, a majority in interest of the outstanding bondholders may, by a writing under their hands and seals, appoint and designate one or more competent persons or corporations, to fill the vacancy so occurring in manner aforesaid; and until the bondholders make such selection, then the President of the Company, with the consent in writing of the owners or holders of one-tenth of all of said bonds outstanding may apply to a Judge of any court of competent jurisdiction, who shall appoint one or more persons to fill the vacancy until the bondholders make an appointment; and in either case the person or persons selected, shall have and possess, and be vested with, the same rights and powers as a Trustee or Trustees, as he or they would have had or possessed, or been vested with, had he or they been originally made a party or parties to this indenture, and shall perform said duties in all respects; and until such appoint-

ment shall be so made, in manner aforesaid, said remaining surviving, acting or competent Trustee shall have full power and authority to execute each and all trusts hereby created.

111 In case at any time thereafter, two or more Trustees should be appointed in the place of one herein named, and there should thereafter become a vacancy by the death, resignation or removal of one or more of said Trustees, the remaining Trustee or Trustees until such time as another may be appointed, shall perform all the duties of his trust, and during such time all acts done by him shall be as valid as if performed by all the Trustees.

Article Twelfth.

And the Company, for itself and its successors and assigns, hereby covenants and agrees, for the consideration aforesaid, to execute and deliver any further deed or deeds to the Trustees, its successor or successors, reasonable and necessary to accomplish the purpose and intent of this indenture, particularly for the conveyance of any right, interest or property acquired by said Company subsequent to the date of this agreement.

Article Thirteenth.

The company further agrees that it will well and truly pay and discharge each and every tax, or assessment, which may, from time to time, be lawfully levied upon the said property or franchise, the lien of which might or could be held superior to the lien of this indenture, to the end that the priority of the lien created by this indenture may at all times be fully sustained.

Article Fourteenth.

The trustee hereby accepts the trusts herein contained and undertakes and agrees to fulfill all the duties and obligations hereby
112 imposed upon it in accordance with the true intent and meaning of this indenture.

Article Fifteenth.

The said company, for itself, its successors and assigns, the above granted and bargained premises unto the said trustee, its successors and assigns, will forever warrant and defend against all lawful claims and demands whatsoever, against the same.

Article Sixteenth.

Provided always, and this grant and conveyance is upon the express condition that upon the payment in full of such of said bonds, as shall have been issued and sold, and the interest due thereon and upon the surrender thereof to the company, and due proof of such payment and surrender, to the satisfaction of the trustee or its successor, or at any time before any of said bonds are sold and issued, on the demand in writing of said company for the cancellation of

said deed of trust, then the estate, title and interest of the sai
trustee, or its successor, shall cease, determine and become void, an
said trustee shall, upon the request of the company, its successors
assigns, duly execute and deliver such proper release or reconveyanc
as may be necessary for the purpose of revesting the record title
said property in the company, its successors or assigns, free from a
liens, trusts or encumbrances hereby created.

In witness whereof, the said parties of the first and second part
have caused these presents to be sealed with their respectiv
113 corporate seals and subscribed by their respective president
and attested by their respective secretaries, on the day an
year first above written.

STATE OF CALIFORNIA, *City and County of San Francisco, ss:*

On this — day of ——, in the year one thousand eight hundre
and ninety-one, before me, —— ——, a notary public in and fo
said city and county, residing therein, duly commissioned and sworn
personally appeared —— ——, known to me to be the president o
the corporation "Woodbridge Canal and Irrigation Company," tha
executed the within instrument, and —— ——, known to me to b
the secretary of the said corporation, and they each severally ac
knowledged to me that such corporation executed the same.

——— ———,
Notary Public.

STATE OF NEW YORK, *City and County of New York, ss:*

On this — day of ——, in the year one thousand eight hundre
and ninety-one, before me, —— ——, a notary public in and fo
said city and county, residing therein, duly commissioned and
sworn, personally appeared —— ——, known to me to be the presi-
dent of the corporation "Atlantic Trust Company," that executed
the within instrument, and —— ——, known to me to be the sec-
retary of the said corporation, and they each severally ac-
114 knowledged to me that such corporation executed the same.

——— ———,
Notary Public.

EXHIBIT "B."

Schedule of Properties.

I.

Those certain irrigation canals situated and being in the county
of San Joaquin, State of California, in township three (3) north
of range five, six and seven (5, 6, 7) east, and being known and
designated as follows, to wit:

That certain dam built and constructed in and across from either
bank of the Mokelumne river, in section 34, township 3 north of
range — east.

Franklin Canal, .601 miles.
Main Canal, East Branch, 9.280 miles.
East Branch—Excavation No. 2, 4.640 miles.
Davis, 2.408 miles.
North Branch, 2.043 miles.
Spanker Ditch, 1.505 miles.
West Branch Canal, 4.570 miles.
Carr Ditch, .410 miles.
Swain Lateral, .495 miles.
Castle Lateral, .653 miles.
Weber Lateral, .264 miles.
Harshner Canal, 1.070 miles.
Parsons Canal, .500 miles.

115 The above canals, ditches and laterals being part of the system located at its point of beginning at the dam in Mokelumne river at the town of Woodbridge, in the east half of section 34, township 4, north of range — east.

II.

Certain riparian rights, in all eighteen, along said Mokelumne river above and below the dam of the Woodbridge Canal and Irrigation Company.

III.

Certain grants of right of way lying and being within said township 5, north of ranges 6, 5 and 7 east, and township 4 north of ranges 5 and 6 east, numbering sixty-three in all, and having an aggregate acreage of 330.43 acres.

Certain contracts from the owners of the lands lying above said dam granting permission to said Woodbridge Canal and Irrigation Company, as assignee, to construct, maintain, etc., said dam in said river; numbering eleven in all.

V.

Certain parcels of real property situate and being in said county of San Joaquin, State of California, and bounded and particularly described as follows, to wit:

a. Being a small piece of land adjoining Block 2 in the town of Woodbridge, known as the "Mill property," being the land on which was erected the old flouring-mill and building heretofore sold to C. C. Blair; and further described as lots 4, 5, and 6 in block "F" of Wood's survey of the town of Woodbridge.

116 *b.* 13.28 acres of land, situate, lying and being in said San Joaquin county on the north bank of the Mokelumne river, immediately opposite said town of Woodbridge, and immediately adjoining the said dam of the said Woodbridge Canal and Irrigation Company, and known as and called the "Cowboy Tract."

c. Certain lands along the north side of said river adjoining the dam and works of said company at Woodbridge, and lying on the north side of said Mokelumne river; comprising in all 96.95 acres, and known and described as the "Journeay Purchase."

d. Those certain bottom lands situate in said county of San Joaquin, and described as fractions No. 1 and 2 and the east half of

the southwest quarter of section 32, township 4, north of range 7 east, M. D. B. and M.

VI.

Those three certain water rights and locations on the Mokelumne River at said Woodbridge, notices of which said locations were posted by Byron D. Beckwith on the bank of said river on the 22d, 23d, and 30th days of December, 1886, respectively, and filed in the office of the county recorder of San Joaquin county aforesaid, on the 31st day of December, 1886.

VII.

Those three certain water locations and claims to water flowing into Mokelumne river, particularly described as follows, to wit:

a. A claim to said water to the extent of 250,000 cubic inches per second at the point on the north bank of said river about
117 250 feet above and to the opposite side of where Green's mill formerly stood in the town of Woodbridge, notice of which bearing date 19th day of May, 1890, and recorded May 20th, 1890, in book "G," volume 8, page 251 of Miscellaneous Records of San Joaquin county, in the office of the county recorder of San Joaquin county.

b. A claim by one H. P. Perkins to said water to the extent of 345,600 inches, at the point where notice in writing was duly posted, that point being a pine tree on the south bank of said river near a suspended water pipe which leads across said river. Said notice bearing date November 6th, 1890, recorded November 30th, 1890, in book "L" of Mining Claims, pages 544 and 545 in the office of the county recorder of Calaveras county.

c. A claim to said water to the extent of 400 cubic feet per second at the point where notice in writing was duly posted by Byron D. Beckwith, that point being on the north bank of the Mokelumne river, on a live-oak tree about 300 feet north of a suspension pipe across said river; said notice being dated January 23, 1892, and recorded January 26, 1892, in book "A" of Water Rights, page 186, in the office of the county recorder of Amador county.

VIII.

All those certain pieces and parcels of land, being in the counties of Calaveras and Amador, and bounded and particularly described as follows, to wit:

The fractional southeast quarter of the southwest quarter of section 33, and fractional northwest quarter of the southwest
118 quarter of section 34; township 5 north of range 10 east, M. D. B. and M.; more particularly described in that deed made by Byron D. Beckwith to the Woodbridge Canal and Irrigation Company the 8th day of February A. D. 1894, and recorded on the 27th day of June, 1894, in book "A," vol. 83, page 78, of Deeds, San Joaquin County Records; and in volume 24 of Deeds, at page 326, Calaveras County Records, and recorded in volume 10 of Deeds at page 269 of the Records of Amador County.

The said parcels of land containing in all 46.61 acres.

IX.

Certain tools and implements used in and about said irrigation canal in the maintenance of said works, office fixtures, three horses, one buggy and harness.

X.

Those certain promissory notes, payable to the Woodbridge Canal and Irrigation Company, and described as follows, to wit:

Note of A. M. Harshner, dated November 21st, 1892, for $400.00.

Note of R. J. and S. A. Parsons, dated January 31st, 1893, for $1,600.

Note of Helen Weber, C. M. Weber and Julia H. Weber, dated May 28th, 1894, for $3,946.02.

Note of Helen Weber, C. M. Weber, and Julia H. Weber, dated May 28, 1894, for $4,591.85.

Note of Helen Weber, C. M. Weber and Julia H. Weber, dated May 28, 1894, for $1,963.66.

119 Note of J. Bischofberger, dated May 28, 1894, for $1,530.20.

Note of H. C. Herron, dated May 28, 1894, for $1,834.25.

Note of Mrs. M. A. Shinn, dated May 28, 1894, for $425.00.

Note of F. T. Conan, dated May 28, 1894, for $648.00.

Note of A. M. Harshner, dated May 28, 1894, for $400.00.

Note of T. E. Jones, dated June 25, 1894, for $896.37.

XI.

All that certain right of way across a strip of land granted by J. J. Hinckley and wife to the Woodbridge Canal and Irrigation Company, along and over certain land of said Hinckley from the county road to the land acquired by said Woodbridge Canal and Irrigation Company on the 8th day of February, 1894, from Byron D. Beckwith hereinabove in this schedule specified.

[Endorsed:] Received a copy of the within amended bill of complaint this 14th day of December, 1895. Daniel Titus, Atty. for Respondent. E. P. Cole, Atty. for Pidge. Wm. M. Cannon and Paul C. Morf, Att'ys for Interveners. Filed December 16th, 1895. W. J. Costigan, Clerk.

120 In the Circuit Court of the United States, of the Ninth Judicial Circuit, in and for the Northern District of California.

No. 11950.

ATLANTIC TRUST COMPANY, Complainant,

vs.

WOODBRIDGE CANAL AND IRRIGATION COMPANY ET AL., Respondents.

Order Taking Amended Bill of Complaint Pro Confesso.

In the above-entitled action the complainant, having on the 16th day of December, 1895, by leave of the said Court, filed herein its

amended bill of complaint, and service thereof having been dul
made upon the respondent, the Woodbridge Canal and Irrigatio
Company, and the time allowed by law in which to plead or answe
or demur to said amended bill of complaint on respondent's par
having expired and no plea, answer or demurrer on respondent
part having been filed, and no order of Court or stipulation
counsel for further time for respondent to plead, answer or demu
to said amended bill of complaint, having been made or procure
and the said respondent being now in default;

Now, therefore, on motion of Messrs. John B. Hall Esq., an
Scrivner & Schell, solicitors for complainant, it is ordered that th
complainant's said amended bill of complaint herein, be and th
same is hereby taken *pro confesso*, by and against the sai
121 respondent, the Woodbridge Canal and Irrigation Company
in accordance with law and the rules of this Court in tha
behalf made and provided.

JOHN B. HALL AND
SCRIVNER & SCHELL,
Solicitors for Complainant.

Entered March 5th, 1896.

W. J. COSTIGAN, *Clerk.*

122 In the United States Circuit Court, Ninth Judicial Circui
Northern District of California.

THE ATLANTIC TRUST COMPANY (a Corporation), Plaintiff,
vs.
THE WOODBRIDGE CANAL AND IRRIGATION COMPANY (a Corpora
tion), Defendant; P. A. BUELL & COMPANY (a Corporation
LOUIS EINSTEIN & COMPANY (a Corporation), FRESNO NATIONA
BANK (a Corporation), STOCKTON LUMBER COMPANY (a Corpo
ration), KUTNER-GOLDSTEIN COMPANY (a Corporation), FRANCI
COGSWELL, H. BENTLEY, BANK OF CENTRAL CALIFORNIA (a Co
poration), J. H. SWAIN, Interveners.

Petition of Intervention of P. A. Buell & Co. et al.

To the Justices of the Circuit Court of the United States for th
Northern District of California:

I.

The petition of intervention of P. A. Buell & Company, a corpo
ration, of the city of Stockton; Francis Cogswell, H. Bentley, J. H
Swain and Stockton Lumber Company, a corporation, all
123 the county of San Joaquin, State of California; Fresno Na
tional Bank, a corporation; Kutner Goldstein Company,
corporation, and Bank of Central California, a corporation, and Lou
Einstein & Company a corporation; all of the county of Fresno, Stat
of California, respectfully shows:

II.

That your petitioners, P. A. Buell & Company, Louis Einstein & Company, Fresno National Bank, Stockton Lumber Company, Kutner Goldstein Company, Bank of Central California at all times herein mentioned were and now are corporations organized and existing under and by virtue of the laws of the State of California.

III.

That at all times in this petition mentioned, the plaintiff, The Atlantic Trust Company was and now is *is* a corporation organized and existing under and by virtue of the laws of the State of New York, having its principal place of business in the city and county of New York, in said State, and being incorporated for the purpose and with the express powers of holding and managing trusts and trust property.

IV.

That at all of said times The Woodbridge Canal and Irrigation Company was and now is a corporation duly organized and existing under and by virtue of the laws of the State of California, having its principal place of business in the city and county of San
124 Francisco, and was formed for the purpose and with the express powers of owning and operating an irrigation canal in the county of San Joaquin in said State.

V.

That heretofore, to wit, on or about the 17th day of July, 1891, the said defendant made and executed one hundred (100) bonds numbered from one (1) to one hundred (100), both numbers inclusive, each of which said bonds was in the form and in the words and figures set forth in the amended bill of complaint of plaintiff, and to each of said bonds were attached twenty (20) interest coupons likewise executed by the defendant, each of which coupons was in the form and in the words and figures as set forth in plaintiff's said amended bill of complaint and numbered as therein alleged.

That each of said bonds when so executed as aforesaid, bore endorsed thereon certificates in the manner and form as set forth in the plaintiff's said amended bill of complaint.

That on or about the 17th day of July, 1891, and to secure the payment of said bonds so executed as aforesaid, the said defendant executed and delivered to the plaintiff, as trustee of the trusts therein created, its indenture of mortgage dated July 17, 1891, and executed in its corporate name by its president and secretary, to which mortgage was affixed its corporate seal. And on or about the same day said mortgage was executed by plaintiff, who accepted said trusts therein created and imposed upon said plaintiff. And said
125 mortgage was recorded on the 10th day of August, 1891, in the recorder's office of the county of San Joaquin, and was in words and figures as set forth in the plaintiff's amended bill of complaint.

VI.

That in and by said mortgage the said Woodbridge Canal and Irrigation Company did mortgage to this complainant, as trustee, to secure the payment of the aforesaid bonds, the entire corporation property of said Woodbridge Canal and Irrigation Company, and all its lands, tenements, hereditaments, privileges, franchises, rights of way, flowage and riparian rights, easements and fixtures then owned or hereafter to be acquired by it and all its canals, flumes, headworks, gates, dams, and bridges then constructed or to be thereafter constructed, extending from the point of diversion in the Mokelumne river, in the town of Woodbridge, in San *San* Joaquin County aforesaid, in a westerly direction to Taison and New Hope in said county, and in an easterly and southerly direction to the Calaveras river, with all other or branch canals that might be thereafter constructed within said territory south and west of the Mokelumne river; and all the estate, right, title and interest, claims and demands, rights of way and other easements, whether at law or in equity, of the said canal company of, in and to the same; and also all buildings, fixtures and personal property thereon or belonging to said canal company; and all receipts, incomes and profits which said
126 company shall derive on account of any contract or agreement for the transfer of water rights as appurtenant to specified lands, excepting the annual rentals for the use of said water and interest endorsed on such contracts or agreements.

VII.

That on said 17th day of July, 1891, and at the time of the execution of the said bonds and the said mortgage M. V. B. Watson was the president and M. T. Moses was the secretary of the said Woodbridge Canal and Irrigation Company, and as such president and secretary they were duly and fully authorized and empowered to execute the said bonds and mortgage, in the name and as the act of the said Woodbridge Canal and Irrigation Company, and to attach to said bonds and mortgage its corporate name, and to affix thereto its corporate seal, by resolution adopted by the vote of the holders of more than two-thirds of its capital stock at a meeting of its stockholders, duly and regularly called, notified, organized and held at the office of the Woodbridge Canal and Irrigation Company in the city and county of San Francisco, State of California, on the 11th day of July, 1891; and said president and secretary were further authorized to so execute said bonds and mortgage by resolution of the board of directors of the said Woodbridge Canal and Irrigation Company, duly passed and adopted.

That since the execution of said mortgage the Woodbridge Canal and Irrigation Company has constructed and now owns an irrigating canal in the county of San Joaquin, State of California, be-
127 ginning at a dam in the Mokelumne river, in the town of Woodbridge, in the southeast quarter (¼) of section thirty-four (34), in township four (4) north of range six (6) east, Mount Diablo base and meridian, and running thence through said sec-

on thirty-four (34) and through and across portions of sections
ree (3), ten (10), eleven (11), fourteen (14), twenty-three (23),
venty-six (26), thirty-five (35) and thirty-six (36), in township
ree (3), north of range six (6) east, and through and across por-
ons of sections one (1), twelve (12) and thirteen (13), in town-
ip two (2), north of range six (6) east; and also through and
ross section eighteen (18), in township two (2), north of range
ven (7) east, and following the line of division between subdi-
isions fifty-one (51) and sixty-one (61) of El Rancho Del Campo
e Los Franceses.

That the said Woodbridge Canal and Irrigation Company has
kewise constructed and now owns and is operating sundry branch
r lateral canals, diverting from said main canal above referred to,
a general westerly direction and irrigating the lands along their
urse.

That the Woodbridge Canal and Irrigation Company, since the
xecution of said mortgage, has likewise acquired and now owns
arious other lands and properties, contracts and mortgages in said
unty of San Joaquin and in the Northern District of the State of
alifornia, a list of which properties is as set forth in said amended
ill of complaint.

28 VIII.

That ninety-two (92) of the aforesaid one hundred (100) bonds
ith said relative coupons attached, secured by said mortgage, have
en by the said defendant duly issued and negotiated for value in
ne course, for money paid, labor done, and property actually re-
ived, and are now outstanding, but the rights of the holders of
venty-six (26), thereof to share in the protection of the lien of the
ortgage is disputed by the plaintiff and the holders of the sixty-
x (66) bonds mentioned in the complaint.

IX.

That on or about the 13th day of January, 1894, the said defend-
nt, for labor done and property actually received, made, executed
nd delivered to the intervener P. A. Buell & Company its certain
romissory note whereby it promised to pay to said intervenor on or
efore October 1st, 1894, the sum of $2,210.06 dollars, with interest
hereon at the rate of eight per cent. per annum from date until
aid, and as collateral security for the payment of said promissory
ote, the said defendant pledged to said intervener four of its said
onds numbered 70, 71, 72 and 73 with all the interest coupons
hereon, except those payable prior to September 1st, 1894.

That no part of said promissory note, nor of either the principal
r coupons of any of said bonds has been paid.

29 X.

That on or about May 25, 1894, the said defendant for value re-
ived, made, executed and delivered to the said intervener P. A.
Buell & Company, its certain promissory note whereby it promised
nd agreed to pay to said intervener on or before October 1st, 1894,
1,000 dollars, with interest thereon at the rate of eight per cent. per

annum from date until paid, and as collateral security for the payment of said promissory note the said defendant pledged to said intervener two of its said bonds, numbers 86 and 87, with all the interest coupons thereon, except those payable prior to September 1st, 1894.

That no part of said promissory note nor of either the principal of either of such bonds or of any of the coupons thereon has ever been paid.

XI.

That on the 25th day of May, 1894, the said defendant for value received made, executed and delivered to the said intervener P. A. Buell & Company its certain promissory note whereby it promised and agreed to pay to said intervener on or before October 1st, 1894, the sum of $1,559.74 dollars, with interest thereon at the rate of eight per cent. per year from date until paid and as collateral security for the payment of said promissory note the said defendant pledged to said intervener three of its bonds numbers 88, 89 and 90, with all the interest coupons thereon except those payable prior to September 1st, 1894.

130 And no part of said promissory note nor of the principal of either of said bonds nor of the coupons thereon has ever been paid.

XII.

That on the 4th day of August, 1894, the said defendant for value received made, executed and delivered to the said intervener P. A. Buell & Company its certain promissory note whereby it promised and agreed to pay to said intervener on or before October 1st, 1894, $1,807.43 dollars, with interest thereon from date until paid at the rate of eight per cent. per year, and as collateral security for the payment of said promissory note the said defendant pledged to said intervener three of its said bonds, numbers 93, 94 and 95 with all the interest coupons attached except those payable prior to September 1st, 1894.

And no part of said note nor of the principal of either of said bonds nor of the coupons thereon has ever been paid.

XIII.

That on the 19th day of February, 1894, the said defendant, for value received, made, executed and delivered to M. J. Lee its promissory note, whereby it promised and agreed to pay to said Lee $549.15 dollars one year thereafter, with interest thereon from date until paid at the rate of eight per cent. per year, and as collateral security for the payment of said note the said defendant pledged to said Lee one of its said bonds, number 69, with all the coupons attached except those payable prior to September 1st, 1894.

131 And thereafter, and before this suit, for value, the said Lee, indorsed, transferred and delivered said promissory note and said pledged bond to secure the same to the said intervener, Fresno National Bank.

And no part of said note nor of said bond has ever been paid.

XIV.

That on May 1st, 1894, the said defendant, for value received, made, executed and delivered to M. J. Lee its promissory note whereby it promised and agreed to pay to said Lee the sum of $1,312.55 dollars one year thereafter, with interest thereon from date until paid at the rate of eight per cent. per year, and as collateral security for the payment of said note the said defendant pledged to said Lee one of its said bonds, number 83, with all the interest coupons attached except those payable prior to September 1st, 1894. And thereafter and before this suit, said Lee, for value indorsed, transferred, assigned and delivered said promissory note and said bond so pledged as aforesaid to said intervener Louis Einstein & Company.

And no part of said note nor of said bond has ever been paid.

XV.

That on the 3d day of October, 1893, the said defendant, for value received, made, executed, and delivered to the said intervener, Stockton Lumber Company, its certain promissory note whereby it promised and agreed to pay to said intervener the sum of $1,000 dollars, one day thereafter, with interest thereon from date until paid
132 at the rate of one per cent. a month, and as collateral security for the payment of said note the said defendant pledged to said intervener two of its said bonds, numbers 51 and 52, with all their coupons attached, except those payable prior to March 1st, 1894.

And no part of said note nor of either of said bonds has ever been paid.

XVI.

That on April 17th, 1894, the said defendant, for value received, made, executed, and delivered to M. J. Lee its certain promissory note, whereby it promised and agreed to pay to said Lee the sum of $1,000 dollars one year thereafter, with interest thereon from date until paid at the rate of eight per cent. a year, and as collateral security for the payment of said note defendant pledged to said Lee one of its said bonds number 75, with all its coupons attached except those payable prior to September 1st, 1894.

XVII.

That on April 17th, 1894, the said defendant, for value received, made, executed and delivered to M. J. Lee its certain promissory note whereby it promised and agreed to pay to said Lee the sum of $1,000 dollars one year thereafter, with interest thereon at eight per cent. a year from date until paid, and as collateral security for the payment of said note defendant pledged to said Lee one of its said bonds, number 81, with all its coupons attached, except those payable prior to September 1st, 1894.

133

XVIII.

That on August 4th, 1894, the said defendant, for value received, made, executed and delivered to M. J. Lee its certain promissory note, whereby it promised and agreed to pay to said Lee the sum of $702.11 dollars one year thereafter, with interest thereon at eight per cent. a year from date until paid and as collateral security for the payment of said note defendant pledged one of its said bonds, number 99, with all its coupons attached, except those payable prior to March 1st, 1895.

XIX.

That on August 4th, 1894, the said defendant, for value received, made, executed and delivered to M. J. Lee its certain promissory note whereby it promised and agreed to pay to said Lee the sum of $1,000 dollars one year thereafter, with interest thereon at eight per cent. a year from date until paid, and to secure the payment of said note defendant pledged to said Lee one of its said bonds, number 98, with all its coupons attached, except those payable prior to September 1st, 1894.

XX.

That on the fourth day of August, 1894, the said defendant, for value received, made, executed and delivered to M. J. Lee its certain promissory note whereby it promised and agreed to pay to said Lee the sum of $1,000 dollars one year thereafter, with interest at the rate of eight per cent. a year from date until paid, and as collateral security for the payment of said note the said defendant pledged to said Lee one of its said bonds, number 96, with all its coupons
134 attached, except those payable prior to September 1st, 1894.

XXI.

That after the respective dates of the said five last-mentioned notes, described in paragraphs 16, 17, 18, 19, and 20, said Lee, for value, indorsed, transferred, assigned and delivered said five (5) promissory notes above mentioned and the bonds to secure the same, viz., numbers 75, 81, 99, 98, and 96, to the firm of Alexander and Goodman, and thereafter and before the commencement of this suit said Alexander and Goodman, for value indorsed, transferred, assigned and delivered to said intervener Bank of Central California, the aforesaid promissory notes and the said bonds pledged to secure the same.

And no part of either or any of said promissory notes or of any of the said bonds has ever been paid.

XXII.

That on May 25th, 1894, the said defendant, for value received, made, executed, and delivered to M. J. Lee its certain promissory note whereby it promised and agreed to pay to said Lee the sum of $1,000 dollars one year thereafter, with interest thereon at eight per cent. a year from date until paid, and as collateral security, for the

payment of said note said defendant pledged to said Lee one of its said bonds number 85, with all its coupons attached, except those payable prior to September 1st, 1894, and thereafter for value, said Lee indorsed, assigned, transferred and delivered said note
135 and bond to Alexander and Goodman, who thereafter and before the commencement of this suit, for value, assigned, indorsed, transferred and delivered to said intervener Kutner Goldstein Company said note and bond.

And no part of either said note or bond has ever been paid.

XXIII.

That on October 30th, 1893, for value received, the said defendant made, executed and delivered to said intervener Joseph H. Swain, its certain promissory note whereby it promised and agreed to pay to said Swain the sum of $665 dollars on or before one year thereafter, with interest thereon at eight per cent. a year from date until paid, and to secure the payment of said note, said defendant pledged to said Swain one of said bonds, number 53, with all its coupons attached except those payable prior to March 1st, 1894.

And no part of either said note or said bond has ever been paid.

XXIV.

That on the first day of May, 1894, for value received, the said defendant made, executed and delivered to M. J. Lee its certain promissory note, whereby it promised and agreed to pay to said Lee the sum of $1,000 dollars one year thereafter, with interest thereon at eight per cent. a year from date until paid, and to secure the payment of said note said defendant pledged to said Lee one of its said bonds, number 82, with all its coupons attached except those payable prior to September 1st, 1894.

136 And thereafter the said Lee for value, indorsed, assigned, transferred and delivered said note and bond to the Bank of Lodi a corporation, and thereafter and before the commencement of this suit, for value received, the Bank of Lodi indorsed, assigned, transferred, and delivered the said note and bond to the said intervener Frances Cogswell.

And no part of either said note or bond has ever been paid.

XXV.

That on February 13, 1894, for value received, the said defendant made executed and delivered to said intervener H. Bentley, its certain promissory note, whereby it promised and agreed to pay to said Bentley the sum of $581.05 on October 1st, 1894, with interest thereon at eight per cent. a year from date until paid, and to secure the payment of said note said defendant pledged to said Bentley one of its said bonds, number 68, with all its coupons attached, except those payable prior to September 1st, 1894.

And no part of either said note or said bond has ever been paid.

XXVI.

That on August 4th, 1894, for value received, the said defendant made, executed and delivered to the said intervener H. Bentley, its certain promissory note, whereby it promised and agreed to pay to said Bentley the sum of $610.71 dollars on the first day of October, 1894, with interest thereon at eight per cent. a year from date until paid, and to secure the payment of said note, said defendant
137 pledged to said Bentley one of its said bonds number 92, with all its coupons attached except those payable prior to September 1st, 1894, and no part of either said note or said bond has ever been paid.

XXVII.

That on the 3d day of October, 1894, the plaintiff filed its bill of complaint to foreclose the mortgage of the defendant and a receiver was duly appointed and on the 14th day of December, 1895, the said plaintiff filed its amended bill of complaint and after the time for appearance, the said defendant defaulted and neglected to appear and in due time the plaintiff had entered a rule taking its bill *pro confesso*.

XXVIII.

That by its amended bill of complaint plaintiff sought to foreclose said mortgage but claimed and alleged therein that only sixty-six (66) bonds had been issued by defendant, and that the bonds of your petitioner, never had been issued, were void, and were still owned by the defendant and praying *inter alia*—

"That it be determined by the decree of this Honorable Court that said sixty-six (66) bonds hereinbefore mentioned, were legally and lawfully issued and sold, and that the same are now outstanding and unpaid and that said Court declare and adjudge that the entire principal sum of said sixty-six (66) bonds so issued and sold, is unpaid, due and payable; and that said Court further, by its said decree, fix and determine the amount of money due for prin-
138 cipal and interest upon said bonds and enter judgment therefor against the said Woodbridge Canal and Irrigation Company in favor of your orator, as trustee for said holders of said sixty-six (66) bonds, and that this Court further by its decree ascertain, fix and determine a reasonable and suitable attorneys' fee for payment of the services of your orator's attorneys in this action; and further fix and determine the amount to be paid your orator as compensation for its services as trustee, and that your orator have judgment against the said Woodbridge Canal and Irrigation Company for the amount found due for principal and interest upon said sixty-six (66) bonds—for said attorneys' fee, and the amount due your orator for its services as trustee herein, and costs and expenses of this action.

"That further by said decree, this Court shall order all of said franchises, canals, lands, and other mortgaged premises and property, to be sold by the marshal of the said Northern Judicial District of the State of California at public auction, in accordance with law

and with the course and practice of this Honorable Court; that the proceeds of said sale may be applied in the payment of the expenses of sale and of the costs in this action; and of said trustee's commissions, and counsel fees, and in the payment of the amount found due by this Honorable Court upon said outstanding bonds to the persons holding the same; that said defendant, and all persons claiming, or to claim by, through or under it, subsequent to the exe-
139 cution of said mortgage, either as purchasers, encumbrancers or otherwise, may be barred and foreclosed of all right, title, claim, or equity of redemption, in the said mortgaged property and premises, and every part thereof. That the complainant, or any other party to this suit, or any bondholder, may become a purchaser at such sale; that the marshal execute deeds to the purchaser or purchasers, and that said purchasers be let into the possession of the property bought by them, on production of such deed; and that it be further adjudged and decreed that any of said bondholders may be purchasers of said property or any portion thereof, and that they may be permitted to pay for the property so purchased by them in the bonds held by such purchasers *pro tanto*, and that such other and further relief may be by said decree given in the premises as to this Court shall seem meet and agreeable to equity."

And your petitioners further show that the plaintiff who is the trustee for all the bondholders of the defendant and whose duty it is to represent and protect all the bondholders, nevertheless refuses and neglects to represent and to protect petitioners, and attacks and assails the validity of said twenty-six (26) bonds of petitioners and refuses and has refused and will refuse to allow petitioners—the holders of said twenty-six (26) bonds—to share in foreclosure proceedings and in the proceeds of the sale of the property of defendant.

And therefore, your petitioners pray that they may be al-
140 lowed to intervene and become parties to the above cause and that it be adjudged and decreed that their twenty-six (26) bonds issued by the defendant are good, valid and binding obligations of the defendant and are secured by the mortgage set forth in the complaint, and that the bonds of your petitioners be declared to be a valid and subsisting lien on the property and franchise of defendant, and that the mortgage of defendant be foreclosed and that your petitioners be allowed their costs, disbursements and attorneys' fees for prosecuting this proceeding, and for such other and further relief as to equity may seem meet and as may be necessary to protect the rights of the owners of the said twenty-six (26) bonds secured by said mortgage.

EDW'D P. COLE AND
WOOD & LEVINSKY,
Solicitors for Petitioners.

[Endorsed:] Service by copy of the within petition is hereby admitted this 25th day of March, 1896. Scrivner & Schell and John B. Hall, Solicitors for Complainant. Service by copy of the within notice and petition is hereby admitted this 25th day of March, 1896. Daniel Titus, Solicitor for Defendant. Filed June 12, 1896. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

141 At a special session of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California held at the courtroom in the city and county of San Francisco, on Friday, the 12th day of June, in the year of our Lord one thousand eight hundred and ninety-six.

Present: Honorable Joseph McKenna, Circuit Judge.

No. 11950.

ATLANTIC TRUST COMPANY
vs.
WOODBRIDGE CANAL AND IRRIGATION COMPANY.

Order Allowing Intervention of P. A. Buell & Co. et al. to be Filed.

Ordered that the motion of P. A. Buell & Co. *et al.* for leave to file petition in intervention herein be, and hereby is granted, J. J. Scrivner, Esq., counsel for complainant, being present and not objecting thereto.

142 At a stated term, to wit, the March Term, A. D. 1897, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the city and county of San Francisco, on Monday, the 5th day of April, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: The Honorable William W. Morrow, Circuit Judge.

No. 11950.

THE ATLANTIC TRUST COMPANY
vs.
THE WOODBRIDGE CANAL AND IRRIGATION COMPANY.

Order Directing Entry of Decree in Favor of Buell & Co. et al. Interveners.

The issues joined herein between complainant and P. A. Buell & Co. *et al.*, interveners, heretofore heard and submitted, having been fully considered, and the opinion of the Court having been filed, it is ordered that a decree be entered herein in favor of said Buell & Co. *et al.*, in accordance with the opinion filed.

143 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 11950.

ATLANTIC TRUST COMPANY, Plaintiff,
vs.
WOODBRIDGE CANAL AND IRRIGATION COMPANY ET AL., Defendants.

Report of Receiver.

(Filed August 10, 1897.)

To the Honorable, the Justices of the Circuit Court of the United States, of the Ninth Judicial Circuit, Northern District of California:

Now comes E. C. Chapman, receiver appointed by the Court in the above-entitled cause, and reports to the Court as follows:

Upon receiving the order heretofore made by the Court in this cause appointing me receiver herein, and on the 3d day of October, 1894, I duly qualified as such receiver and entered upon the discharge of my duties as such. On the following day I visited the office, property and works of the company at Woodbridge, in the county of San Joaquin, and was there, by the superintendent in charge, placed in charge and possession of the properties of the corporation described in the schedule of properties handed to me at the time of my appointment, which property is fully de-

144 scribed in a report made by me on the 26th day of December, 1894, now remaining on file in this court. After a full and careful examination of all the properties aforesaid and ascertaining the condition thereof, balancing up the books of the Company and procuring a trial balance thereof with a list of bills receivable, securities and other papers belonging to or affecting the property of the corporation, and on said 26th day of December, 1894, I made and filed a full and complete report of the result of my investigations and of proceedings as receiver in said cause down to that date, together with a report of my receipts and disbursements up to that time, which report, with the exhibits thereto attached, covers forty-five pages of typewritten matter and now remains on file in this court; wherefore, it is not deemed necessary at this time to repeat the same in detail but reference is now here made to the same and to the statements, inventory and accounts therein reported as fully as if the same were here repeated and made a part hereof.

Upon filing said report of December 26th, 1894, there was, as shown by said report, a balance due to me on account of moneys actually and necessarily expended up to that time in the management and care of the property committed to my charge as such receiver; there were no funds in hand with which to reimburse myself for such balance or to pay the necessary and current expenses of the care of said property, and no revenues coming in and no source of available revenue until at least the middle of the ensuing

year; I was necessarily under a regular expense of about three
145 hundred and fifty ($350.00) dollars per month for the help necessary to care for the property at the dam and canal, besides the expense of a bookkeeper for the time being and my own personal expenses in that behalf, and in the report I asked the Court for an order authorizing me to borrow the sum of seven thousand five hundred ($7,500.00) dollars to be used for the expenses and management of said property. No direct action was taken under this prayer, but subsequently and on the 23d day of January, 1895, upon notice to all the parties in interest and upon the hearing upon said report and upon testimony given in open court, an order was duly given and made by the Court authorizing and empowering me as such receiver to borrow the sum of five thousand ($5,000.00) dollars to be used by me as such receiver for the purpose of paying the expenses of the management and care of said property as a going concern at a rate of interest not to exceed eight per cent. per annum and to hypothecate or assign any and so many of the notes and mortgages or other choses in action belonging to the corporate defendant and then in my hands, as such receiver, as might be necessary as collateral security for the payment of the certificate or certificates to be issued by me for moneys loaned under said order. Under this order I made diligent and strenuous effort to borrow the whole or some part of the moneys so authorized to be borrowed but was unable to borrow the same upon any of the collateral securities held by me by reason of the rate of interest fixed in said order, and
of the fact that the mortgages held by me, and which I was
146 authorized to offer as collateral security for the payment of such loan, proved to be, upon examination, second mortgages upon the real property therein described and not deemed to be by money lenders good security for such loan.

Thereupon I reported to the Court my inability to raise any money under the order so given and made, and upon application therefor and notice duly given to all the parties, afterwards and on the 15th day of February, 1895, another order was duly given and made by the Court authorizing me, as such receiver, to borrow the sum of five thousand dollars for the purpose of paying the expenses and indebtedness already incurred by me in the management of said property and of paying the continuing and accruing expenses of such management and to issue my certificate or certificates therefor, bearing interest at the rate of not to exceed ten per cent. per annum, payable out of any funds that might come into my hands as such receiver applicable thereto, and providing that such certificates so issued should be and constitute a first and prior lien upon all the property described in the mortgage, for the foreclosure of which this action is brought, and if not paid prior thereto, then to be paid out of the proceeds of any sale of said property next after the costs of suit and sale, and before the payment of any other sum on account of said mortgage or the indebtedness secured thereby.

This order was made upon the report made by me to the Court dated January 30th, 1895, and duly filed herein, and to which
reference is now here made, in which report it was shown
147 among other things that there was then an actual indebtedness against the receiver in the sum of seventeen hundred

dollars for work and labor necessarily employed in the care of the property; that all his employees were threatening to leave unless promptly paid; that there were then about twenty thousand dollars outstanding time checks or certificates given by the defendant corporation for work, labor and material furnished prior to my appointment as receiver; that the standing credit of the defendant was such that men refused to work even for the receiver without prompt payment for their wages, and that I was without funds to make such payments or even to pay my own personal expenses or the expenses of my counsel in the management and care of the business.

Even under this order I found myself unable to raise money on certificates issued by me thereunder except in small sums raised from time to time, aggregating the sum of $2,350.00, and these were the only certificates ever issued under this or the first named order for money received, but in January and February, 1896, other certificates were issued in payment for labor and material, to the amount of $5,415.15, as shown by Exhibit "D" hereto annexed.

Pending the filing of the report and making of the order last aforesaid and in the hope of thereby raising the necessary funds to care for the property and manage the business as a going concern, on the 9th day of January, 1895, I made a report to this Court which was about that time duly filed herein showing that there were large bodies of land lying under the flow of the waters of the canals in my
148 charge capable of being irrigated therefrom, for which the owners had not secured or made contracts for water rights for said lands. Several of said owners having applied for contracts for the supply of waters for their respective parcels of land, I asked of the Court for authority to make such contracts and sell water rights as had been the custom of the company before my appointment. I then believed and still believe that under such authority ample funds could have been raised to have enabled me to pay all the expenses of protecting and caring for the property and carrying on the business of irrigation during the term of my appointment. But the plaintiff, and others interested in the action, seriously and earnestly opposed the granting of any such authority for the sale of water rights by the receiver, and the application was denied, so that during the term of my service as such receiver I have been entirely unable to avail myself of this, the best source of revenue to be derived from said property.

At the time of entering upon the discharge of my duties I found the large wooden dam of the company located at Woodbridge in a defective condition and was advised by competent engineers that the west abutment thereof must be immediately repaired. I proceeded at once to make the necessary repairs to prevent the dam washing away, and in the spring of 1895 found myself compelled to make many and expensive repairs upon the canals, lateral ditches, gateways, and bridges over the canals and ditches, rendered necessary by the ravages of winter, and by means thereof was enabled to con-
149 tinue to supply water to the farmers who had secured from the Company water rights, until the 23d day of July, 1895,

when, without any warning or means of prevention, the river undermined the easterly portion of the dam and carried away the east abutment thereof. This caused the river to change its channel and flow over the land formerly occupied by such abutment. The quantity of earth carried away by this change in the course of the stream amounted to some 10,000 cubic yards, which formerly constituted the easterly bank thereof. The sheet piling in front of the dam for a distance of one hundred and twenty feet was completely washed out and many of the heavy timbers supporting the large wooden front apron were displaced. This injury occurred in the midst of the irrigating season and it became necessary at once to repair the same so as to continue the supply of water for persons entitled to water for irrigation from the canals and property of the company. After the most strenuous efforts I succeeded in effecting these repairs and restoring the dam before the commencement of the winter rains of 1895, at a very heavy cost, a portion of which was paid by issuing to the farmers in the vicinity, who furnished most of the labor therefor, receiver's certificates to the amount of five thousand four hundred and fifteen and fifteen-hundredths ($5,415.15) dollars (as shown by Exhibit "D" hereto attached), the balance of which was paid in part by moneys advanced by myself for necessary labor and material and in part by time checks issued to persons for work and labor rendered in that behalf.

150 Before making these repairs I had learned that the dam had, for a long time before my appointment, been a subject of almost constant repair and great expense on the part of the company, and found from experience and observation that this was largely due to the conformation of the river channel immediately and for some distance above the dam, causing destructive accumulations of drift, producing great and unnecessary pressure upon the dam and requiring an expenditure of large sums of money at frequent intervals to remove the same. While making my repairs upon the dam I caused the river channel to be improved in this regard, using the material taken therefrom for the repair and strengthening of the dam, thereby relieving the latter from the extraordinary pressure to which it was theretofore subjected, and there has since been no trouble from that cause. But from other and different and unseen causes, growing out of the defective foundation in the original works, on the 26th day of July, 1896, a portion of this dam was washed away, and on the 13th day of August, 1896, I reported the facts and circumstances to this Court, which report now remains on file in this cause, and urged upon the Court and the parties in interest the necessity of taking early measures for the repair of the same, so far as to be prepared for the supply of water for the then succeeding and now current irrigation season, or the early sale of the property, as it was impossible for the receiver to raise the further and necessary funds for its protection without sale of the property or the aid of advances made by parties in interest; but in view of

151 an anticipated early final decree in this cause, no definite action has been taken under said report.

In November, 1896, I had entirely exhausted my own personal

resources in raising and advancing money to care for the property and continuing the work in my charge as such receiver, and demands were pressing upon me for further payments on such account, and for taxes upon the property, and I applied to the Court for a further order allowing me to borrow money on receiver's certificates, and upon such application and upon consent of plaintiff an order was given and made by the Court, authorizing me to so borrow the sum of $2,500.00, which I succeeded in doing and issued my certificate for that sum, bearing interest at the rate of ten per cent. per annum, dated November 27, 1896, making the total sum of cash ever received by me upon receiver's certificates, $4,850.00, and the total sum of certificates issued for cash, labor and material, $10,265.15.

The total cash received by me as receiver from all sources, down to June 1st, 1897, is shown by Exhibit "A," hereto attached, and amounts to $7,262.64.

The cash paid out by me as such receiver in the care and management of the property and business during the same period is shown by Exhibit "B" hereto attached, and amounts to the sum of $13,825.11.

The present indebtedness of the receivership (June 1st, 1897), exclusive of any compensation to be allowed to me for my services as such receiver, or of any compensation which may be allowed to my counsel for his services in that behalf, is as follows:

152 Balance due receiver on account of cash disbursements	$6,562.47
Amount of time checks outstanding, as shown by Exhibit "C" hereto annexed, plus such interest as may be allowed thereon	5,620.88
Amount of outstanding certificates, plus interest on each at the rate of ten per cent. per annum from their respective dates as shown by Exhibit "D" hereto annexed	10,265.15
Indebtedness for which no certificates or time checks are issued, as shown by Exhibit "E" hereto annexed	1,645.85
Total indebtedness, exclusive of compensation of receiver and his counsel	24,094.35
Add to this the cash received by receiver from sources other than outstanding certificates	2,412.64
Makes the total expenses of management and care of the property and business, exclusive of compensation of receiver and his counsel, for the thirty-two months named	$26,506.99

—or an average of $825.00 per month, as against over $1,800.00 per month, the average cost of the management and care of the same property and business, as shown by the books prior to my appointment, and at least one-third of this expense has been extraordinary

by reason of the necessary repairs and rebuilding of a portion of the dam, and improvement of the river channel to prevent further
153 breakage. Besides this the canals, locks, gates and ditches have been put and are now in better condition than ever before.

During the period of my administration I have been compelled twice to take proceedings in this court against parties for contempt in seizing and taking possession of property of the defendant corporation in my charge as receiver, both of which proceedings have necessarily involved some expense. I have also, as receiver, been made defendant in common with the defendant in this cause and the plaintiff herein in an action brought for the foreclosure of mortgage in the Superior Court of the county of San Joaquin, which mortgage covered certain lands in said county, upon which the defendant herein also held a mortgage, now in the charge and under the control of this receiver, and in which case I find upon investigation there is a serious question as to which of the mortgages covering said land has priority under the laws of this State. I have, therefore, appeared by counsel in said cause and answered and filed a cross-complaint therein and the case is still pending. I have also, during my administration, been cited to appear before the board of supervisors of the county of San Joaquin to show cause why the rates of compensation to be collected for water supplied for irrigation from the works in my charge as receiver should not be fixed by said board of supervisors and to such citation appeared before said board in person and by counsel and succeeded in preventing any action on the part of said board which should affect the use of said prop-
154 erty or the collection of rates for water supplied therefrom, pending the final determination of this action in the administration of said property by receiver.

In this cause and court one J. C. Thompson appeared by an elaborate petition, and caused me as receiver to be cited to appear and show cause why an order should not be made requiring me to issue to him grants of water rights to the amount and value of twelve thousand dollars or over, for and on account of certain scrip which he claimed to hold, which had been issued by the corporate defendant. Responsive to that citation I felt it to be my duty to appear and I did appear in person and by counsel, both by demurrer and answer which, after several hearings were argued both orally and by written brief, resulting in a denial of his application.

The bills receivable and securities which came into my hands upon my appointment were such as were given to the corporation in payment for water rights theretofore sold by the company to parties having lands under the flow of the canals, and were all on long time but most of them bearing interest. Upon some of these a part of the interest which has matured has been collected as shown by Exhibit "A" hereto attached. The annual interest, together with the rentals for water supplied, either by express terms or by common understanding, became due on the 1st of September in each year. I have found it impossible, without liquidation, to collect all the interests so maturing or of all the annual rentals, by reason of the in-

tense hostile feeling and of the many disputes which have arisen between the defendant company and its patrons and debtors
155 wherein large counter-claims are asserted for damages for alleged failure on the part of the company to keep the terms of its contracts and to supply water as and when required. In fact, in the one case now pending, to which allusion has already been made for the foreclosure of mortgage, wherein I have filed cross-complaint and asked for foreclosure of the mortgage held by me as receiver, and which mortgage has just matured, a counterclaim is asserted wherein damages are claimed largely in excess of the total amount of said mortgage and the interest due. Hoping for an early decree in and settlement of this case and that under such decree the property and assets in my hands would pass into the hands of those who should become more immediately interested therein, I have not deemed it wise to institute litigation for the purpose of making these collections, and there is now a balance due to the company of interest and water rates maturing on the 1st of September last amounting to $4,831.38 still remaining unpaid, as shown by Exhibit "G" hereto annexed. For this balance I should have felt it my duty to bring suit and endeavor to recover the same, had it not been, under the assurance of the parties litigant herein, an early termination of this suit and transfer of the claims has been anticipated.

The inventory of real property, bills receivable, etc., remains the same as at the time when I took charge as receiver and as shown by the exhibits annexed to my report of December 26th, 1894. The personal property, such as tools, implements, livestock, and material for building and repair, has necessarily changed; some of it
156 being worn out, some of it consumed, and other like property acquired in its place. Of this class of property now in charge of the receiver an inventory is herewith given, marked Exhibit "I" and hereunto annexed.

Upon entering upon the discharge of my duties and visiting the site of the works, I found matters almost in condition of a riot; the most intense feeling was existing on the part of a large number of people against the management; threats of all kinds were made against the corporate defendant and against the property under its charge, and which came into my charge as receiver. Being myself without funds to pay off the claims which had accrued for work and labor and without authority to pay them off, if I had had any funds, and also being without funds sufficient or adequate to pay the necessary expenses of the management and care of the property during my administration, it has been with great difficulty and with considerable peril that I have been able to maintain and preserve the property and prevent the same from falling into decay and ruin. Very frequently when I have visited the works, I have been met by angry and excited crowds threatening my own life and threatening to blow up the dam with dynamite and destroy the works, and it has been with great difficulty that I have been able to keep peace and preserve the works from destruction, and because of this difficulty and for the purpose of allaying this excitement and preserving the property of the company, I have been forced to make

such advances from my own private funds and from funds
157 raised upon my personal credit, as appear from this report and the exhibits thereto attached.

Immediately upon entering upon the discharge of my duties and ascertaining the condition of affairs, I retained Judge Chas. N. Fox as my counsel, and he has been my counsel and adviser and assistant in allaying the excitements and difficulties through which I have had to pass. I found it necessary to consult with him every week and sometimes almost daily for advice as to my powers and how best to meet the conditions which confronted me. He has aided me in raising the moneys which it has been necessary to raise, and in the name of his firm has appeared for me and on my behalf whenever and wherever it has been necessary for me to appear in court, either in this cause or in other courts and tribunals, consultation with boards of supervisors and other public officers, and has rendered a very large volume of service as counsel for me as such receiver.

Up to the present time no order has been made in this cause fixing any measure of compensation, either for myself or for my counsel, and no provision has been made for the payment of compensation either of receiver or his counsel. Anticipating and hoping an early decision of the cause, and being without funds upon which to draw for compensation, even if an order for fixing the same had been made, we have been awaiting the final termination of the cause before applying to the Court for such order, but I now respectfully petition the Court that an order be made in this cause allowing a just and reasonable compensation to me as receiver for my
158 services in this cause and providing for the payment thereof, and that a like order be made fixing and allowing a just and reasonable compensation for my counsel for his services as such and providing for the payment thereof; and that my accounts of receipts and disbursements as shown herein and my actions as such receiver be approved.

All of which is respectfully submitted.

E. C. CHAPMAN, *Receiver.*

CHAS. N. FOX,
Of Counsel for Receiver.

STATE OF CALIFORNIA, *City and County of San Francisco,* ss:

E. C. Chapman, being duly sworn, deposes and says: That he is the receiver who makes the foregoing report; that he has read the said report and the exhibits thereto attached and knows the contents thereof, and that the same is true of his own knowledge.

E. C. CHAPMAN.

Subscribed and sworn to before me this 17th day of June, 1897.

[SEAL.] THOS. E. HAVEN,
Notary Public in and for the City and County of San Francisco, State of California.

159 EXHIBIT "D."

Showing Outstanding Certificates, Each Bearing Interest from its Date at 10% Per Annum.

B. G. Lathrop, April 2, 1895	500.00
B. G. Lathrop, May 4, 1895	100.00
E. B. Harris, May 16, 1895	500.00
B. G. Lathrop, June 4, 1895	100.00
B. G. Lathrop, July 4, 1895	100.00
B. G. Lathrop, Aug. 4, 1895	100.00
J. U. Castle, Sept. 2, 1895	150.00
C. Swain, Sept. 2, 1895	150.00
E. Fisk, Sept. 2, 1895	150.00
B. G. Lathrop, Sept. 4, 1895	100.00
E. B. Harris, Oct. 4, 1895	100.00
E. B. Harris, Nov. 4, 1895	100.00
E. B. Harris, Dec. 4, 1895	100.00
E. B. Harris, Jan'y 4, 1896	100.00
Frank Davis for labor and material, Jan'y 14, 1896	2,000.00
Frank Davis, for labor and material, Jan'y 14, 1896	467.30
Frank Davis, for labor and material, Jan'y 31, 1896	681.85
Frank Davis, for labor and material, Feb., 1896	950.00
Frank Davis, for labor and material, Feb., 1896	456.00
J. J. Hinkley, services, Feb., 1896	860.00
Fox & Reser, Trustees' Cert., Nov. 27, 1896	2,500.00
Total	$10,265.15

160 [Endorsed:] Report of Receiver. Service of copy of the within is hereby admitted this 9th day of August, 1897. J. J. Scrivner, J. B. Hall, Geo. W. Schell, Attorneys for Plaintiff. Subject to Exceptions on File. Daniel Titus, Att'y for Def't. W. M. Cannon and P. C. Morf. Filed August 10, 1897. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the United States Circuit Court for the Northern District of California.

No. 11950.

THE ATLANTIC TRUST COMPANY, R. B. SALISBURY ET AL., Interveners,
vs.
THE WOODBRIDGE CANAL AND IRRIGATION COMPANY.

Jno. B. Hall and Scrivner & Schell, Substituted for Page, Eells & Wheeler.
Eq. for Receiver.
P. W. Morf and W. M. Cannon, for Interveners.
E. P. Cole, for Certain Interveners.
Elliott McAllister—Daniel Titus.

161 *Docket Entries.*

1894.

Oct. 3. Filed Bill of Complaint: Filed Appearance & consent.
Oct. 3. Filed Ord. appointing receiver & supplemental order of final Appt. Filed Bond of Receiver.
Dec. 10. Filed Bill of Complt. of R. B. Salisbury, *et al.*, Interveners.
Dec. 29. Filed Report of Receiver.

1895.

Jan. 2. Filed Notice of filing report & mo. to authorize Receiver to borrow, &c.
Jan. 3. Filed substitution of atty.
Jan. 10. Filed Pet. of Rec'r for authority to make contracts to supply water.
Jan. 14. Ord. mos. argued & Con. to 21st for further arg't.
Jan. 21. Ord. Petition &c., withdrawn without prejudice, &c.
Jan. 21. Ord. mo. granted & Receiver allowed to borrow $5,000.
Jan. 23. Filed Ord. authorizing Rec'r to borrow money.
Jan. 31. Filed Report & Petition of Receiver &c.
Jan. 31. Filed ord. fixing time for hearing &c.
Feb. 4. Filed Petition of Pidge for preferred claim.
Feb. 5. Filed ord. ex. time.

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Feb. 6. Ord. mo. for ord. authorizing Receiver to borrow money upon certificates &c. arg'd. & Con. to 13th. Filed ord. to S. C. *in re* claim of Pidge.
Feb. 6. Ord. ord. to s. c. con. to 13th.
Feb. 13. Ord. mo. & ord. to s. c. con. 14th.
Feb. 14. Ord. mo. & ord. to s. c. con. to 15th.
Feb. 14. Filed Demurrer to Complt. of Intervention.
Feb. 15. Ord. mo. granted & Interveners all'd exept. to ruling.
Feb. 15. Ord. ord. to s. c. con. to 18th. Filed Ord. authorizing Rec'r to borrow money & issue certificates &c.
Feb. 18. Ord. ord. to s. c. arg'd & sub'd, Briefs 5 x 10 x 5.
Feb. 20. Filed Brief of Petitioner Pidge.
Feb. 27. Filed Plffs. Brief on Petn.
Mar. 4. Ord. dem. to complt. of intervention con. to 11
Mar. 7. Filed Defts. Demurrer to Complt. of Intervener.
Mar. 11. Ord. dem. to compl. of intervention con. to 18th.
Mar. 12. Filed Reply Brief of Pidge.
Mar. 19. Filed Brief of Interveners on claim of Pidge.
Mar. 25. Ord. dem. to Complt. of Intervention submitted on Briefs 3 x 3 x 3.
Mar. 28. Filed Plffs. Brief on Dem. to Complt. of Intervention.

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Apr. 1. Ord. defts. dem. to Complt. of Intervention con. till after decision of Complts. dem. to Complt. of Int'n Ord. Reporter's fee of $10. be paid by Receiver.

Apr. 11. Filed Brief of Intervener on Dem.
June 24. Ord. claim of Pidge made preferred claim &c.
Aug. 6. Ord. dem. of plff. to complt. of Interveners sustained in part & overruled in part and ord. Interveners re-form complt. in accordance with decision.
Sept. 7. Filed Reformed Bill of Complt. of Intervener.
Nov. 20. Filed Affidavit for order direct'g delivery of tools.
Nov. 25. Ord. cause set for Dec. 18.
Nov. 26. Filed no. of setting cause for trial.
Dec. 10. Filed Petitions of Cowell, of Isaacs, of Griffin, of Grohe, of Lane; of Alloway; of Salisbury & Vickery; of Densmore; of Caldwell; of Williams; & of Blakeley for preference.
Dec. 11. Filed Substitution of Attys. for Complainant.
Dec. 13. Filed Ord. to show cause.
Dec. 16. Ord. ord. to show cause con. to 30th. Ord. Complt. have leave to file amended complt. & allowed to file dems. to.
Dec. 16. Re-formed Bill of Interveners & to Petitions of claimants for preference, except Pidge. Filed Substitution of Attys. for Complt. Filed Stip. allowing Amd. Complt. to be filed. Filed Amended Complt. of Complainant.
'64 Filed 12 Demurrers of Complt. to interventions of various claimants.
Dec. 17. Entered rule taking petition of Pidge *pro confesso* (Eq. Rule Bk. No. 3, p. 25).
Dec. 18. Ord. hearing *in re* preferred claims etc. con. indefly. on payment of $10. cost to claimant Pidge.
Dec. 30. Ord. ord. to s. c. & dems. to preferred claims set for Jan. 6, '96.

1896.

Jan. 6. Filed Stip. to Amd. complt.
Mar. 4. Filed notice of argument of Dem. etc., on Mar. 6.
Mar. 6. Ord. dems. to claims of Interveners argd. & subd. & cause set for hearing Mar. 13th.
Mar. 5. Ent'd Rule taking Am. Bill *pro confesso*. (Eq. R. B. 3, p. 35.)
Mar. 13. Ord. hearing con. to Mar. 27.
Mar. 27. Ord. con. to Apr. 3.
Apr. 7. Ord. con. to 21st.
May 1. Ord. con. to 5th.
May 8. Filed Notice of bondsman to be released from Receiver's bond.
May 18. Ord. mo. con. to 25th.
May 26. Ord. con. indefinitely. Filed application to file petn. of intervention.
June 12. Ord. mo. to file petn. granted. Filed Petition of Intervention of Buell & Co. *et al.*
June 23. Filed Receipt for copy Pet'n.

'65

July 3. Filed Complts. Answer to Petition of Interveners.
July 13. Filed Replication of Interveners.

Aug. 3. Ord. set for Sept. 2.
Aug. 14. Filed Report of Receiver & Motion for Order of Sale.
Aug. 24. Ord. mo. con. to Sept. 7th.
Sept. 21. Ord. con. & set head of Cal'r for 28th.
Sept. 28. Ord. ord. for Order of Sale con. to Oct. 5.
Oct. 12. Ord. con. to 26th.
Oct. 14. Filed Order to show cause. Filed Affidavit.
Nov. 9. Ord. mo. for ord. of sale & Ord. to s. c. con. to 16th.
Oct. 19. Filed Stipulation. Filed Order authorizing Receiver's Certificates to the amt. of $2,500.
Nov. 30. Filed Stip. as to Interveners.
Dec. 2. Filed Authorities for Buell & Co. *et al.* on Interveners. Con. for term. Contempt matters discharged. Mo. of Fox, Argued & submitted.
Dec. 5. Filed pts. of Complt.
Dec. 11. Filed petition of Thompson for Spl. performance.
Dec. 21. Ord. S. C. pet. of Thompson Contd. to 28th.
1897.
Jan. 4. Ord. Complt. dem. to petitions of preference overruled, 10 days to complt. to answer. Ord. ord. to s. c. on petn. of
166 Thompson argued & con. to 11th. Filed Order to Show cause. Filed Opinion. Filed Demurrer to pet'n of Thompson.
Jan. 11. Ord. ord. to s. c. con. to 25th.
Jan. 25. Ord. ord. to s. c. on & dem. to pet'n of Thompson con. to 28th.
Jan. 28. Filed Demurrer of Buell & Co. to pet'n. of Thompson. Ord. ord. to s. c. & dems. argued, petitioner all'd 5 days to amend pet'n & further hearing con. to Feb. 5th. Filed Brief of Receiver on order to s. c.
Feb'y 5. Ord. cont. ord. s. c. and demurrers, to 8th inst.
Feb'y 8. Ord. ord. s. c. etc. cont'd to 15th inst.
Feb'y 15. Ord. cont. ord. s. c. and demurrers to 19th inst.
Feb'y 18. Ord. ord. s. c. and dem'r of complt. & of Buell & Co. *et al.* to petition & amended pet. of Thompson argued & submitted with leave to file points. Filed amendments to petition of J. C. Thompson. Filed demurrer of complainant to amended pet. of J. C. Thompson.
Feb'y 23. Filed Brief of E. P. Cole on pet. of J. C. Thompson.
Feb'y 25. Filed petition of F. G. McClelland.
Feb'y 27. Filed dem'r of Complt. to petition of F. G. McClelland. Order setting aside submission of issues joined between Complt. & Buell *et al.*
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M'ch 2. Filed ord. extending time of complt. to ans'r petition of Alloway. Ord. setting case. Ord. dem'r cont'd to Apl. 5th. Ord. head of Cal. for 3d inst.
M'ch 4. Cause heard & submitted.
M'ch 15. Ord. sustain demurrers of Complt. and of P. A. Buell & Co. to petition of J. C. Thompson *et al.* for preference, 20 days allowed to amend petition. Opinion filed 24th.

M'ch 29. Filed stipulation relating to bonds etc.
Ap'l 3. Filed Stip. of facts *in re*. pet. of McClellan.
Ap'l 5. Ord. dem. to pet'n of McClellan con. to 12th. Ord. decree entered in favor of Buell & Co., Interveners. Filed Opinion on Interventions of Buell & Co. *et al.*
Ap'l 12. Ord. dem. con. May 3.
May 3. Ord. dem. to Petition of McClellan con. to June 7th.
May 25. Filed Order to show cause & to speed trial.
May 28. Filed Complts. Motion for final decree & order of sale. Filed Complts. Brief as to Bonds of Buell & Co.
May 29. Filed Stipulation of Facts on Cowell Petition & other pet'ns for preference. Filed Stip. as to facts between Plff. & E. Franklin *et al.* Interveners & defendant.
June 1. Ord. ord. to s. c. & mo. for decree con. to 24th.
June 24. Ord. ord. to s. c. con. to July 1st.
June 25. Filed Pet. of J. N. Castle.

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June 30. Filed Complts. Exceptions to Rec'r's Report.
July 1. Filed Demurrer & Answer of Receiver to Petition of Thompson. Filed Order to show cause on Petition of J. M. Castle. Filed Demurrer of Buell, pet'nr to Petition of Castle. Ordered motion of Complt. for final decree & order of sale; & Ord. to s. c. why Petition of Castle should not be granted; & Demurrer of Buell & Co., to said pet'n of Castle; and the Complt's. mo. to vacate the default entered by Pidge against it, heard and submitted. Filed Affidavit of Scrivner for Complt. on appl'n to vacate default on Pet'n of Pidge. Filed Complts. Ex. A. & Pidge's Exs. 1 & 2, on Hearing of mo. for decree. Filed Complts. Brief.
July 3. Filed Affidavit of E. P. Cole.
July 14. Filed Assignment by Receiver of moneys coming to him.
July 19. Filed Agreement in relation to assignments by Rec'r.
Aug. 9. Filed Opinion Ord. claims of Cowell, Alloway, *et al.*, Pidge, Buell & Co. *et al.* McClellan & Castle allowed, &c., & decree of foreclosure & sale be filed & entered. Ord. Rec'r allowed to file*d* reports. Filed Supp'l Report to July 31, '97. Ord. Reports of Receiver & except'ns

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thereto referred to Master in Chancery to report, &c. Ord. complt. allowed to withdraw Opinion. Filed Receipt for Opinion.
Aug. 10. Filed Report of Receiver. Ord. hearing of Application to fix compensation Counsel, &c. set for 18th inst.
Aug. 11. Filed Order in matter of Pet'n of J. N. Castle.
Aug. 18. Applications to fix compensation of Counsel & Receiver heard & submitted. Filed Claim of Complt. as Trustee.
Sept. 2. Filed Master's Report. Filed Testimony. Filed 5 Packages of Vouchers. Entered Notice of Filing of Master's Report (Eq. R. Bk. 3, p. 98).

Sept. 7. Filed Testimony on application to fix compensation of Counsel.
Sept. 13. Filed Report of Receiver for August, 1897.
Sept. 14. Filed Affidavit & Petition of Margaretha Meyer for permission to proceed with suit in State Court against plff. & respdts. Filed Order permitting Meyer to proceed with suit.
Sept. 16. Filed Application & Order for compromise of certain claims.
Sept. 18. Filed Findings of Fact. Filed & Entered Decree of Sale. (Eq. Dec. Reg. 5, p. 159, *et seq.*)

* * * * * * *

170 In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California. In Equity.

No. 11950.

THE ATLANTIC TRUST COMPANY, Complainant,
vs.
THE WOODBRIDGE CANAL AND IRRIGATION COMPANY (a Corporation), Defendant; J. C. THOMPSON, WILLIAM ALLOWAY ET AL., A. H. COWELL, F. FRANKLIN ET AL., WILLIAM C. PIDGE, BUELL & CO. ET AL., F. G. MCCLELLAND, I. N. CASTLE, Interveners.

Decree.

Decree of Foreclosure and Sale.

(Filed and Entered September 18, 1897.)

This cause having come on regularly in its order at this the July Term of the court, 1897, and it appearing to the Court that on the 3d day of October, 1894, the above-named complainant, The Atlantic Trust Company (a corporation), made and filed its bill of complaint in this court and cause against The Woodbridge Canal and Irrigation Company (also a corporation), defendant, for foreclosure of a certain mortgage or deed of trust in said bill of complaint referred to; that subpœna was duly issued and served
171 thereon and no answer made thereto, that on the said 3d day of October, 1894, under and by virtue of an order of this Court duly given, made and entered in said cause, E. C. Chapman, Esq., was appointed receiver of the property of said corporate defendant described in said mortgage, and duly qualified as such, and on the following day entered into the possession of said property, which has ever since remained and still is in *custodia legis* under the charge and care of said receiver; and it further appearing that afterwards an amended bill of complaint was filed by said complainant in said cause and duly served upon the said defendant, and that afterwards and on the 16th day of December, 1895, the said defendant being in default for not pleading to said amended bill, a rule was

entered taking such amended bill *pro confesso* as to said defendant; that subsequently bills of intervention were filed in said cause by the interveners J. C. Thompson, William Alloway *et al.*, A. M. Cowell, F. Franklin *et al.*, William C. Pidge, Buell & Co. *et. al.*, F. G. McClelland, and I. N. Castle, and the cause having been finally heard by the Court and submitted upon the said amended bill of plaintiff taken *pro confesso*, the said several bills of intervention, the evidence and proofs, oral and documentary, given in open court, and the several written stipulations or agreed statements of facts made and filed herein by the parties in interest by their respective solicitors and now remaining on file herein, the Court having duly considered the same; and also having considered the report
172 of the master settling the reports and accounts of the receiver filed in this cause; and having made and filed its findings of fact herein:

Now, therefore, in consideration of the law and the premises, and upon motion of Messrs. Scrivner & Schell and John B. Hall, solicitors for said trustee; plaintiff in this cause—

It is now here by the Court ordered, adjudged and decreed that at the time of the filing of the bill of complaint in this cause, the defendant Woodbridge Canal and Irrigation Company was in default in the payment of interest on all its outstanding bonds secured by said mortgage, or deed of trust, and that under and in pursuance of the terms of said bonds and mortgage, or deed of trust, the full amount of the principal of said outstanding bonds, with the interest thereon from March 1st, 1894, as represented by the interest coupons falling due September 1st, 1894, was then due and payable and unpaid, in gold coin of the United States, and that the same with the subsequently accruing interest thereon, still remains due and payable and unpaid, in such gold coin.

And it is further ordered, adjudged and decreed that the mortgage or deed of trust, exhibited with plaintiff's bill of complaint filed in this cause, to wit, that certain mortgage or deed of trust bearing date the 17th day of July, 1891, made and executed by the corporate defendant The Woodbridge Canal and Irrigation Company to the corporate plaintiff, The Atlantic Trust Company, to secure the payment of one hundred bonds issued by the said The Wood-
173 bridge Canal and Irrigation Company, bearing date on the same day, each in the sum of one thousand dollars, payable in gold coin of the United States on the first day of September, in the year 1901, at the office of said Atlantic Trust Company, with interest thereon at the rate of six per cent. per annum, payable semi-annually, upon presentation and surrender of the coupons annexed to said bonds, which said mortgage or deed of trust was afterwards and on the 10th day of August, 1891, duly recorded and is now of record in book "A" of Deeds, volume 74, page 361, in the office of the county recorder of the county of San Joaquin, in the State of California, is and constitutes a valid mortgage and lien upon all the property therein described and hereinafter particularly described, and upon all the franchises, rights, privileges, waters, water rights, dams, reservoirs, canals, ditches, flumes, waterworks and rights of way, and

upon all lands or interest in lands, and upon all personal property of every nature and kind, including credits, choses in action, bills receivable, securities, notes, bonds, mortgages, and claims for money due or to become due, owned or held by the said defendant, Woodbridge Canal and Irrigation Company at the date of said mortgage or deed of trust, or at any time since acquired by said defendant, as security for the payment of so many of the bonds mentioned in said mortgage or deed of trust as were lawfully issued and now remain outstanding and unpaid, together with the interest due upon said bonds and remaining unpaid, and as security for the payment of the cost and expenses of administering the trust created by said
174 mortgage or deed of trust, and of all cost and expenses of foreclosing the same, including the cost and expenses of the management and care of said property *pendente lite*, the whole being payable in gold coin of the United States, according to the terms and conditions of said mortgage or deed of trust.

And it is further ordered, adjudged and decreed that there is now due and owing and unpaid, for and on account of the cost and expenses of the foreclosure of said mortgage or deed of trust and the management and care of the property pending this action, plaintiff's costs and expenses of suit, taxes at the sum of $———, also—

(*a*) To E. C. Chapman, Esq., receiver appointed by this Court, for and on account of advances made by him in the administration, care and management of the property covered by said mortgage or deed of trust and placed in his care and management pending this suit, the sum of $6,605.72, less $3,500.00 now here paid thereon.

(*b*) Also the following named sums, being the amount due as of this date upon receiver's certificates duly issued by said receiver under authority of the Court, with interest upon the principal sum named in each of said certificates from this date until paid, at the rate of ten per cent. per annum, to wit:

To Whom Issued.	Date.	Principal.	Total.
B. G. Lathrop	April 2, 1895	$500.00	$622.36
B. G. Lathrop	May 4, 1895	100.00	124.42
E. B. Harris	May 16, 1895	500.00	616.25
B. G. Lathrop	June 4, 1895	100.00	122.75
175			
B. G. Lathrop	July 4, 1895	100.00	121.92
B. G. Lathrop	Aug. 4, 1895	100.00	121.09
J. U. Castle	Sept. 2, 1895	150.00	180.45
C. Swain	Sept. 2, 1895	150.00	180.45
E. Fisk	Sept. 2, 1895	150.00	180.45
B. G. Lathrop	Sept. 4, 1895	100.00	120.31
E. B. Harris	Oct. 4, 1895	100.00	119.42
E. B. Harris	Nov. 4, 1895	100.00	118.55
E. B. Harris	Dec. 4, 1895	100.00	117.75
E. B. Harris	Jan. 4, 1896	100.00	116.92
Frank Davis	Jan. 14, 1896	2,000.00	2,332.44
Frank Davis	Jan. 14, 1896	467.30	540.80

Frank Davis	Jan. 31, 1896.....	681.85	792.28
Frank Davis	Feb. 1, 1896.....	950.00	1,093.85
Frank Davis	Feb. 1, 1896.....	456.00	530.34
J. J. Hinckley	Feb. 1, 1896.....	860.00	999.28
Fox & Reser	Nov. 27, 1896.....	2,500.00	2,699.30

(c) Also the following named sums to the persons therein named or to their assignees upon time checks issued by the said receiver for and on account of expenses incurred by him during his administration, to wit:

To Whom.	Date.	Amount.
Henry Pixley,	Nov. 10, '94.....	$75.00
H. Mannion,	Nov. 15, '94.....	150.00
Henry Pixley,	Dec. 10, '94.....	75.00
H. Mannion,	Dec. 15, '94.....	150.00
Henry Pixley,	Jan. 10, '95.....	75.00
H. Mannion,	Jan. 15, '95.....	150.00
176 N. I. Baldwin,	Mar., '95.....	80.00
O. Atwood,	May, '95.....	339.00
J. E. Bray,	June, '95.....	198.80
J. E. Bray,	June 26, '95.....	16.20
J. E. Bray,	June 29, '95.....	5.00
F. M. Lindaugh,	July 1, '95.....	446.00
F. M. Lindaugh,	July '95.....	195.00
N. I. Baldwin,	Aug. 1, '95.....	100.00
Wm. Alloway,	Sept. 18, '95.....	66.50
John Lane,	Sept. 23, '95.....	34.15
Theo. Caldwell,	Sept. 23, '95.....	10.50
Geo. Faass,	Sept. 23, '95.....	108.50
B. Landaeh,	Sept. 23, '95.....	30.00
B. F. Rutledge,	Sept. 23, '95.....	52.75
F. H. McClelland,	Sept. 23, '95.....	36.50
Theo. Caldwell,	Sept. 23, '95.....	24.00
A. H. Cowell,	Sept. 23, '95.....	20.90
John Kellar,	Oct. 18, '95.....	18.01
Boyce Bros.,	Oct. 18, '95.....	45.08
N. I. Baldwin,	Oct. 31, '95.....	24.86
F. G. McClelland,	Nov. 1, '95.....	125.15
D. Kelley,	Nov. '95.....	249.85
M. A. Davis,	Nov. '95.....	24.80
J. Ridley,	Nov., '95.....	14.00
C. P. Mosher,	Nov. 30, '95.....	5.50
James Griffin,	Nov., '95.....	38.00
B. F. Rutledge,	Dec. 16, '95.....	126.75
Chas. Rutledge,	Dec. 16, '95.....	82.00
G. D. McClelland,	Dec. 16, '95.....	211.50
N. Culp,	Dec. 16, '95.....	15.00
177 R. W. Sawens,	Dec. 16, '95.....	43.50
F. M. Lindaugh,	Dec. 16, '95.....	29.00
H. McClelland,	Dec. 16, '95.....	34.50

F. G. McClelland, Jan. 17, '96	27.00
P. A. Buell & Co., Feb. '96, Cert. of indebtedness for material	987.89
Fred Grobe, June 23, '96	89.60
J. E. Bray, July 6, '96	12.30
N. I. Baldwin, Feb. 1, '97	300.00
F. G. McClelland, Feb. 1, '97	300.00
N. I. Baldwin, Mar. 8, '97	25.00
G. D. McClelland, May 26, '97, 27 days at 2	54.00
H. Johnson, May 26, '97, 25 days at 2	50.00
D. Johnson, May 26, '97, 25 days at 2	50.00
Geo. Rutledge, May 26, '97, 26 days at 2	52.00
A. A. McClelland, May 26, '97, 2½ days at 1	2.50
Baldwin Account, Time Checks issues since June 1st, '97	133.30
Geo. D. McClelland	32.00
Geo. Rutledge	28.00
H. Johnson	28.00
D. Johnson	28.00

(*d*) Also the following named sums to the persons named or their assignees for and on account of work done and material and board furnished for men, the same having been performed and furnished for the said receiver and for which no time checks or certificates have been issued, to wit:

To J. J. Hinckley		$1,545.50
	To Baldwin & McClelland	143.00
178	To N. I. Baldwin	200.00
	To F. G. McClelland	300.00
To John J. Torry, Jr.		42.00
To Fox & Gray for costs advanced		39.35
Making total of		$2,269.85

And it is further ordered, adjudged and decreed that there be allowed and paid out of the proceeds of the sale hereinafter ordered, as and for the further costs and expenses of this suit and of the care and management of the property *pendente lite*, the following sums, to wit:

(*e*) To E. C. Chapman, Esq., receiver, as and for his compensation for his services as such receiver from the date of his appointment to the 1st day of October, 1897, the sum of $9,000.00.

(*f*) To Messrs. Fox & Gray, as and for their compensation as counsel for said receiver, the sum of $9,000.00.

And it is further ordered, adjudged and decreed that next after the payment of the sums hereinbefore mentioned and before the payment of any sum for or on account of the principal or interest of any of the bonds so issued as aforesaid and hereinafter mentioned, that there be allowed and paid out of the proceeds of said sale as and for claims accrued against the defendant Woodbridge Canal and Irrigation Company between November 3d, 1893, and October 3d,

1894, for expenses of operating the canal system and necessary for keeping the same a going concern, and now here adjudged
179 and decreed to be a prior lien upon said property, the following sums, to wit:

(*g*)

N. I. Baldwin	$517.40
Bert L. Bray, laborer and ditch-tender	58.60
J. E. Bray, ditch-tender	158.73
H. J. Hudson, laborer and ditch-tender	286.00
Ernest Lane, laborer	45.60
B. Lambach, laborer	68.35
Floyd Nain, ditch-tender	135.50
P. Mortinson, ditch-tender	198.00
F. C. McClelland, superintendent	392.00
M. Nolan, laborer and repairer	40.00
W. C. Pidge, surveying	50.00
R. Salisbury, B. M.	
Vickory, Salisbury & Vickory, Carpenters	350.00
Ah Young and Ah Hong, repairs	141.75
H. E. Salisbury, ditch-tender	90.00
Geo. Rochette, repairs	8.00
H. E. Welch, repairs	12.75
Theo. Caldwell, ditch-tender	194.40
Wm. Alloway, laborer	306.00
John Lane, laborer	178.35
Fred Grohe, laborer	307.50
Jas. A. Griffin, ditch-tender	278.00
Geo. Fause, laborer	279.05
Jas. Blakeley, ditch-tender	276.00
N. Densmore, ditch-tender	108.40
A. H. Cowell, supplies	190.40
180 H. Thompson, supplies	496.21
John Torry, Jr., services as bookkeeper	571.55

(*h*) To W. C. Pidge for services rendered between October 13th, 1893, and October 1st, 1894, as civil engineer, and adjudged to be a prior lien upon said property, the sum of $1,801.37.

(*i*) To F. C. McClelland on behalf of himself and as assignee of others, as set forth in his petition filed in this cause for services rendered in keeping the canals in a proper state of repair, the sum of $922.12.

(*j*) And it is further ordered, adjudged and decreed that next after the payment of the sums hereinbefore mentioned there be paid to Messrs. Scrivner & Schell and John B. Hall, solicitors for plaintiff in said cause, the sum of $9,000.00.

(*k*) To E. P. Cole and ——, solicitors on behalf of Buell & Co. and other interveners, holders of twenty-six of the bonds so issued as aforesaid, the sum of $2,000.00.

And it is further ordered, adjudged and decreed that after the payment of the several sums hereinbefore mentioned, and not be-

fore, there be allowed and paid to the owners and holders of each of the several bonds hereinafter mentioned, upon the surrender thereof with the relative coupons attached, the sum of $1,210, on each of said bonds, with interest on the sum of one thousand dollars of the moneys so due upon each of said bonds from the 1st day of September, 1897, to the date of payment, at the rate of six per cent. per annum, if the proceeds of said sale after the payment of
181 the costs of sale and of the costs of suit and of the several sums mentioned in subdivisions "(*a*)" to and including subdivision "(*k*)" shall be sufficient to pay, in full, the ninety-four (94) bonds now here presented, otherwise that each of the seventy-nine bonds mentioned in this paragraph of this decree be paid pro rata in the proportion that the amount herein allowed upon each of said bonds bears to the whole amount of the fund so applicable to the payment thereof; said seventy-nine bonds being those made and executed by the defendant, Woodbridge Canal and Irrigation Company, bearing date the 17th day of July, 1891, for the sum of $1,000 each, with interest thereon at the rate of six per cent. per annum, payable semi-annually, and having relative coupons attached therefor and being those known, numbered and designated as follows:

One (1), two (2), three (3), four (4), five (5), six (6), seven (7), eight (8), nine (9), ten (10), eleven (11), twelve (12), thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17), eighteen (18), nineteen (19), twenty (20), twenty-one (21), twenty-two (22), twenty-three (23), twenty-four (24), twenty-five (25), twenty-six (26), twenty-seven (27), twenty-eight (28), twenty-nine (29), thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), thirty-four (34), thirty-five (35), thirty-six (36), thirty-seven (37), thirty-eight (38), thirty-nine (39), forty (40), forty-one (41), forty-two (42), forty-three (43), forty-four (44), forty-five (45), forty-six (46), forty-seven (47), forty-eight (48), forty-nine (49), fifty (50), fifty-seven (57), fifty-eight (58), fifty-nine (59),
182 sixty (60), sixty-one (61), sixty-two (62), sixty-three (63), sixty-four (64), sixty-five (65), sixty-six (66), seventy-six (76), seventy-seven (77), seventy-eight (78), seventy-nine (79), eighty (80), and eighty-four (84), seventy-four (74), seventy (70), seventy-one (71), seventy-two (72), seventy-three (73), eighty-six (86), eighty-seven (87), eighty-eight (88), eighty-nine (89), ninety (90), ninety-three (93), ninety-four (94) and ninety-five (95).

And it is further ordered, adjudged and decreed that out of the proceeds of the sale hereinafter ordered to be made upon surrender of the respective bonds hereinafter mentioned with the relative coupons attached (said bonds being of the same issue and date as those mentioned in the preceding paragraph of this decree) there be paid to the holders and claimants thereof respectively, the sums hereinafter respectively mentioned if the proceeds of said sale, after the payment of the costs of sale and costs of suit, and the payment in full of the claims hereinbefore mentioned in paragraphs "(*a*)" to "(*k*)," inclusive, are sufficient to pay the bonds mentioned in the preceding paragraph of this decree and the sums mentioned in this paragraph of this decree and the sums mentioned in this paragraph

in full, otherwise that the same be paid pro rata in the proportion that the total amount due upon the bonds mentioned in the preceding paragraph plus the total amount authorized to be paid in this paragraph of this decree bears to the total amount of the fund applicable to the payment thereof, to wit:

183 To Eaton, Newell & Buckley, upon the surrender of bond No. sixty-seven (67) with the relative coupons attached, the sum of $1,210.00, plus interest upon $1,000 thereof from the first day of September, 1897, to date of payment at the rate of six per cent. per annum.

To Louis Epstein & Co., upon the surrender of bond No. eighty-three (83) with the relative coupons attached, the sum of $1,210, plus interest upon $1,000.00 thereof from the 1st day of September, 1897, to the date of payment at the rate of six per cent. per annum.

To the Fresno National Bank upon the surrender of bond No. sixty-nine (69) the sum of $715.87.

To the Stockton Lumber Company upon the surrender of bonds numbered fifty-one (51) and fifty-two (52) with the relative coupons attached, the sum of $1,200.00, with interest upon $1,000 thereof from the 1st day of September, 1897, to the date of payment, at the rate of six per cent. per annum.

To the Bank of Central California upon the surrender of bonds numbered seventy-five (75) and eighty-one (81) with the relative coupons attached, the sum of $2,420.00, with interest upon $2,000 thereof from the 1st day of September, 1897, to the date of payment, at the rate of six per cent. per annum.

To the Bank of Central California upon the surrender of bonds numbered ninety-six, ninety-eight and ninety-nine with the relative coupons attached, the sum of $3,630, with interest upon $3,000.00 thereof from the 1st day of September, 1897, to the date of payment at the rate of six per cent. per annum.

184 To J. J. Swain upon the surrender of bond No. fifty-three (53) the sum of $822.24.

To H. Bentley upon the surrender of bond No. sixty-eight (68) with the relative coupons attached, the sum of $747.60.

To H. Bentley upon the surrender of bond No. ninety-two (92) with the relative coupon attached, the sum of $763.26.

To Francis Cogswell upon the surrender of bond No. eighty-two (82) with the relative coupons attached, the sum of $1,210.00, with interest upon $1,000 thereof from September 1st, 1897, to the date of payment, at the rate of six per cent. per annum.

And it is further ordered, adjudged and decreed that the intervener, J. C. Thompson, take nothing by his bill of intervention filed herein and that the same be dismissed.

And it is further ordered, adjudged and decreed that the interveners, William Alloway, Salisbury & Vickory, John Lane, Fred Grohe, Theo. Caldwell, N. Densmore, James A. Griffin, George Faas, W. H. Williams, James Blakely, E. Franklin, Samuel Estees, Edgar Wyatt, Joseph J. Hinckley, H. H. Saunders, and J. N. Hinckley and A. H. Cowell (for himself and as assignee for many others in

his petition named), and each of them, except so far as is hereinbefore adjudged and determined, are not entitled to priority over the said outstanding bonds, and that except as far as is herein already provided their respective claims be, and they are hereby denied and their several petitions dismissed.

185 And it is further ordered, adjudged and decreed that the petition of E. Franklin, Samuel Estees, Edgar Bryant, Joseph J. Hinckley, H. H. Saunders and J. N. Hinckley, praying for judgment of lien under the Mechanics' Lien Law of the State of California, prior in time to the lien of said mortgage, for services rendered by said interveners, be and the same is hereby dismissed.

And it is further ordered, adjudged and decreed that all of the said ninety-four bonds hereinbefore specifically mentioned and described, were legally and lawfully issued and the same are now outstanding and unpaid and the amount of money now due for principal and interest upon said bonds is the sum of $112,530, as of the 1st day of September, A. D. 1897, all of which is payable in gold coin of the United States and secured to be paid by the mortgage or deed of trust aforesaid, and that the complainant is entitled to a decree of foreclosure and order of sale of the mortgaged estate and property for the moneys so due as aforesaid and the other moneys so due as aforesaid hereinbefore mentioned.

Wherefore and on the motion of said Scrivner & Schell and John B. Hall, Esq., solicitors for said complainant, it is by the Court now here further ordered, adjudged and decreed that the mortgage or deed of trust hereinbefore referred to be and the same is hereby forever foreclosed, and that all and singular the property of every nature and kind, real, personal and mixed, therein described and every part thereof, and every interest of the defendant therein, and all and singular the franchises, rights, privileges, rights of

186 way or of flowage, lands, tenements, with the appurtenances thereunto belonging, waters, water privileges, water rights, lakes, dams, reservoirs, canals, ditches, conduits, with rights of way therefor, and all other appurtenances thereto belonging, together with all and singular the personal property of every nature and kind, including office furniture and fixtures, tools, implements, machinery, wagons, buggies, harness, lumber and livestock, notes, bonds, securities, credits, book accounts, claims and demands for moneys due or to become due, and all other properties and rights owned or held by the defendant Woodbridge Canal and Irrigation Company on the seventeenth day of July, 1891, or at any time since then acquired by said defendant and now remaining, be sold according to law and the rules and practice of this Court, in one parcel and not separately, but as an entirety, to the highest and best bidder, for gold coin of the United States, and the proceeds of such sale be applied, after confirmation of sale, to the payment and satisfaction of the costs of sale, costs of suit, and of the several sums of money in this decree hereinbefore mentioned and made payable, and in the order of priority hereinbefore mentioned and not otherwise, and that the residue of said proceeds, if any there be, be brought into

Court to be disposed of as the Court shall direct; that upon the making and final confirmation of said sale, the defendant, Woodbridge Canal and Irrigation Company, and all and each of the said petitioning interveners, and all persons claiming or to claim under them or either of them, and all persons having liens
187 subsequent to said mortgage under the real estate described in said mortgage, and their personal representatives and all persons having liens or claims by or under such subsequent liens and their heirs or personal representatives, and all persons claiming under them, all persons claiming to have acquired any estate or interest in said premises subsequent to the commencement of this suit, be forever barred and foreclosed of and from all equity of redemption, and claims of, in or to said mortgaged premises, and every part and parcel thereof from and after the delivery of the deed thereafter executed under the order of this Court; such sale shall be made at public auction, by the commissioner hereinafter appointed for that purpose, at the city of San Francisco, in the Northern District of California, at a place in said city and on a day to be named by such commissioner, and at an hour to be named by him, between the hours of ten o'clock A. M. and three o'clock P. M., and after not less than twenty days' public notice thereof and of the time and place thereof, by publication daily in one newspaper of general circulation printed and published in the city of San Francisco, and one newspaper of general circulation printed and published in the city of Stockton, both in said Northern District of California, or if for any cause the same shall not then be made, then on some subsequent day to which the same may be adjourned by said commissioner, and of which public notice shall be given; at such sale no bid shall be accepted for a less sum than one hundred and twenty thousand dollars and before any bid is finally
188 accepted and the property struck off, the bidder shall be required to deposit with the commissioner on account thereof, gold coin of the United States, to the full amount required to pay the costs of sale, costs of suit, and all sums required for any of the purposes of payment under this decree, other than that of payment on account of the bonds herein mentioned, the same to be by the said commissioner deposited in court, with his report of sale, and the balance of the amount of the accepted bid to be paid into court at or before the hearing upon the question of confirmation of sale, in like gold coin of the United States, provided, however, that for any balance of said bid over and above the total amount of the costs of suit and of sale including counsel fees, trustees' commissions, balance due the receiver for advances and for compensation for his services, amounts due on receiver's certificates and outstanding checks, and the amount due for work and labor done and board and material furnished for the receiver, not represented by his certificates or time checks, the amount herein allowed to receiver's counsel, and all other preferential claims herein allowed, the excess may be paid and satisfied by and with the outstanding mortgage bonds hereinbefore mentioned with the matured and unpaid coupons thereon,

the same to be received in payment to the extent aforesaid, according to their value to be ascertained and determined by the net amount of the proceeds arising from such sale and applicable to payment on account of such bonds; said sale shall be made subject to confirmation by the Court, and within twenty days after such
189 sale the commissioner must file with the clerk of this court a verified report and account of the sale, together with proper affidavits showing that the regular and required notice of the time and place of sale was given; and upon confirmation of such sale by the Court, the commissioner must make, execute and deliver to the purchaser the necessary and proper certificate of sale of property other than choses in action and securities, and of choses in action and securities, necessary and proper assignments and other instruments of transfer and conveyance either of the parties, complainant and defendant, and any intervener or bondholder or any other person may become a purchaser at the sale hereby ordered; and permitted to pay for the said property upon the terms and in the manner and form hereinbefore prescribed and required. Six months after confirmation of sale, if no redemption thereof has been made, the commissioner shall make, execute and deliver the property and necessary deeds of conveyance of the property so sold as aforesaid. Upon confirmation of the sale the purchaser or purchasers of said mortgaged premises and property shall be let into possession thereof, and any of the parties to this action who may be in possession of said premises or property or any part thereof, and any person, who, since the commencement of this action, had come into possession under them or either of them, shall deliver possession thereof to such purchaser or purchasers, on production of the certificate of sale therefor, or of any order of this Court for the delivery of such possession.

190 E. H. Heacock, Esq., Master in Chancery, is hereby appointed commissioner to make such sale and report, and to make, execute and deliver the necessary and proper certificates of sale, conveyances and assignments thereunder after confirmation as aforesaid. Before entering upon his duties, he must be sworn to perform them faithfully and must execute an undertaking with sufficient sureties to be approved by the Court, in the sum of five hundred dollars, lawful money of the United States of America, to the effect that he will faithfully discharge the duties of such commissioner according to law. He shall receive as compensation for his services as such commissioner the sum of five hundred dollars, and no more.

The description and particular boundaries of the property authorized to be sold under and by virtue of this decree, as far as the same can be ascertained from the mortgage above referred to (of date July 17, 1891), or from the complaint filed and evidence given in this action, are as follows, to wit:

The entire corporate property of said Woodbridge Canal and Irrigation Company and all its lands, tenements, hereditaments, privileges, franchises, rights of way, flowage and riparian rights, ease-

ments, and fixtures, owned by said canal company at the date of said mortgage or thereafter acquired by said Company, and all its canals, flumes, headworks, gates, dams, bridges, etc., that (at said date) constructed or which has since been constructed by said Company extending from the present point of diversion in
191 the Mokelumne river, in the town of Woodbridge, in San Joaquin county, aforesaid, in a westerly direction of Taison and New Hope, in said county, and in an easterly and southerly direction to the Calaveras river, with all other or branch canals that said company has, at any time constructed within said territory, south and west of the Mokelumne river, and all the estate, right, title, and interest, claims and demands, rights of way, and other easements, whether at law or in equity, of the said company of, in and to the same, and each and every part and parcel thereof, and all buildings, fixtures and personal property thereon, or belonging to said company, and all receipts, incomes and profits derivable from any contracts or agreements for the transfer of water rights as appurtenant to specified lands, and to which receipts, incomes and profits the said canal company is or may become entitled.

The following schedules contain a more particular description of the property subject to this decree:

SCHEDULE "A."

1 safe, 2 desks, 2 wood chairs, 1 office stove, 6 links stove pipe, 1 letter press, 1 large map showing system of canals, 1 box of old drawings of civil engineers, 1 spirit level, 1 set double harness (except collars, reins, and bridle, which were stolen), 1 set single harness, 1 horse, 1 road wagon, 3 large cross-cut saws, 1 surveyor's table, 4 hand pumps, 1 fifth chain, 2 iron pails, 1 keg of 8d. nails, 2
192 large monkey-wrenches, 250 machine bolts, ⅝ x 7, 10 ft. of 2 in. old rope, 176 ft. of 1¼ in. old rope, 108 ft. of 1½ in. old rope, 50 ft. of 2 in. new rope, 2 small rollers, 2 large double blocks, 1 small double block, 1 large ripple block, 43 drift bolts, 2 ft. long x ⅝ in., 2 nail sets, 2 crow-bars (small), 1 iron dog 2 ft. x 1 in., 1 iron bar for raising outlet gates, 1 auger, 14 bolts, 1 ft. x ⅝ in., 3 gopher traps, 4 iron eyes for a four horse scraper, 4 bolts, 2 ft. x ¾ in., 1 bolt 2 ft. x 1 in., 23 long-handled shovels, 6 picks, 1 four tined fork, 3 hatches, 2 hooks for raising check boards 4 ft. by 1 in., 2 1-gallon coal-oil cans, 4½ kegs 10d nails, ½ roll barbed wire, 2 round pile rings, 2 square file rings, 2 cant hooks, 6 ft. 1-inch gas-pipe, 2 scythes, 2 axes with handles, 2 axes without handles, 1 large auger for boring post holes, 40 rods ¾ inch x 8 ft., 6 iron screws for head gates, 1 spade, 3 mattocks, two (2) short handle shovels, 3 crow-bars (large) 1 bar for drawing nails, 1 grind stone, 1 ladder, 1 work-bench, two four-horse scrapers, complete, 2 four-horse scrapers, out of repair, 2 old tool chests, 1 sled, ¼ ton hay, 3 sacks barley, 25 trestles, 1 plow, 20 wheel-barrows, 1 gate lift for dam gates, 2 small single blocks, 1 large iron hook 4 ft. x ⅞ in., 1 grappling-hook, 1 stove shovel, 1 piece of chain, 1 pile driver, 24 ft. high, 1 lot old lumber about 3,000 ft. pine, 1 ink-stand.

SCHEDULE "B."

Those certain promissory notes payable to the Woodbridge Canal and Irrigation Company and described as follows, to wit:

193 Note of A. M. Harshner, dated November 21, 1892, for $400.00.

Note of R. J. and S. A. Parsons, dated January 31, 1893, for $1,600.00.

Note of Helen Weber, C. M. Weber and Julia H. Weber, dated May 28, 1894, for $1,963.00.

Note of H. C. Herson, dated May 28th, 1894, for $1,834.25.

Note of Mrs. M. A. Shinn for $425.00.

Note of F. T. Cowan, dated May 28th, 1894, for $648.00.

Note of A. M. Harshner, dated —— 28th, 1894, for $400.00.

Note of T. E. Jones, dated June 25th, 1894, for $896.37.

Amounts of money due and unpaid September 1, 1898, for interest upon mortgages held by the company and for water supplies:

William Langherst		$48.50
Mrs. C. Gerard		68.88
David Housh		30.00
Henry Beckman		394.18
Ezra Fiske		124.97
Mary and H. C. Beckman		238.70
L. M. Morse and J. LeRoy White		212.73
C. M. and Julia Weber		752.82
Sidney Newell		216.24
E. M. Carr, R. E. Wilhoit, and H. K. Goodwin		280.11
A. M. Harshner and H. Barnhart (Mtg. $400 due)		606.10
	C. C. Franklin	30.00
194	Mrs. E. Franklin	90.00
	R. J. and S. A. Parsons	457.00
Balfour, Guthrie & Co.		228.95
Harvey Hersom		155.13
Thomas Jones (Mtg. due)		896.37

SCHEDULE "C."

(*a*) An irrigating canal, in the county of San Joaquin, State of California, beginning at a dam in the Mokelumne river, in the town of Woodbridge, in the southeast quarter (¼) of section thirty-four (34) in township four (4) north of range six (6) east, Mount Diablo base and meridian, and running thence through said section thirty-four (34) and through and across portions of sections three (3), and ten (10), eleven (11), fourteen (14), twenty-three (23), twenty-six (26), thirty-five (35) and thirty-six (36) in township three (3) north of range six (6) east, and through and across portions of sections one (1), twelve (12) and thirteen (13), in township two (2) north of range six (6) and also through and across section eighteen (18) in township two (2) north of range seven (7) east, and fol-

lowing the line of division between subdivisions fifty-one (51) and sixty-one (61) Rancho del Campos de los Franceses.

Those certain irrigation canals situated and being in the county of San Joaquin, State of California, in township four (4) north of ranges five, six and seven (5, 6 and 7) east, and being known and described as follows, to wit:

195 That certain dam built and constructed in and across from either bank of the Mokelumne river, in section 34, township 4, north of range 6 east.

*Franklin Canal, 601 miles.
Main Canal, East Branch, 9,280 miles.
East Branch, excavation, No. 2, 4,840 miles.
Davis Branch, 2,408 miles.
North Branch, 2,043 miles.
Spanker Ditch, 1,505 miles.
West Branch Canal, 4,570 miles.
Carr Ditch, 410 miles.
Swain Lateral, 495 miles.
Weber Lateral, 264 miles.
Castle Lateral, 653 miles.
Harshner Canal, 1,070 miles.
Parsons Canal, 500 miles.

The above canals, ditches and laterals, being part of the system located at its point of beginning, at the dam in Mokelumne river at the town of Woodbridge, in the east half of section thirty-four (34) township four north of range 6 east.

(*b*) Certain riparian rights along said Mokelumne river, above and below the dam of the company at said Woodbridge acquired by the company from the persons and at the times, respectively, below specified, to wit:

A right granted to the Woodbridge Canal and Irrigation Company to appropriate to the use of said corporation 450,000 cubic inches of water per second under four-inch pressure, by agreements

196 made, executed and delivered to said company, and which agreements are recorded in the office of the county recorder of the county of San Joaquin, as follows, to wit:

1. An agreement executed by H. D. Shinn, Mrs. R. O. Snediger and D. J. Shinn, recorded in book "G," vol. 10, Miscellaneous, page 232.

2. An agreement executed by William Dames, recorded in book "G," vol. 10, page 233, Miscellaneous.

3. An agreement executed by Sidney Newell, recorded in book "G," vol. 10, page 345, Miscellaneous.

4. An agreement executed by G. H. Barber, recorded in book "G," vol. 10, page 238, Miscellaneous.

5. An agreement executed by W. W. Fogg and Fogg & Pratt, recorded in book "G," vol. 10, page 239, Miscellaneous.

6. An agreement executed by Charles I. Boyce, recorded in Book "G," vol. 5, page 225, Miscellaneous.

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*[These figures are apparently wrong, but they are as certified—The CLERK.]

7. An agreement executed by John Jackson, recorded in book "G," vol. 5, page 226, Miscellaneous.

8. An agreement executed by John Boyce and Amos Boyce, recorded in book "G," vol. 5, page 227, Miscellaneous.

9. An agreement executed by David T. Ray, recorded in book "G," vol. 10, page 228, Miscellaneous.

10. An agreement executed by Henry Koontz, recorded in book "G," vol. 10, page 230, Miscellaneous.

11. An agreement executed by Henry Koontz, recorded in book "G," vol. 10, page 231, Miscellaneous.

12. An agreement executed by Henry Prouty, recorded in book "G," vol. 10, page 236, Miscellaneous.

197 13. An agreement executed by George Housken, recorded in book "G," vol. 10, page 240, Miscellaneous.

14. An agreement executed by James G. Nolan, recorded in book "G," vol. 10, page 234, Miscellaneous.

15. An agreement executed by John McFarland, recorded in book "G," vol. 10, page 235, Miscellaneous.

16. An agreement executed by Maria A. Card, recorded in book "G," vol. 5, page 224, Miscellaneous.

17. An agreement executed by T. R. Burkett, recorded in book "G," vol. 10, page 223, Miscellaneous.

18. An agreement executed by Mary A. Folger, M. Augusta Folger, M. E. Folger and John C. Thompson, unrecorded.

19. An agreement executed by R. W. Williams, unrecorded.

(*c*) Certain rights of way lying and being within this said township 5 north, of ranges 5, 6, and 7 east, and township 4 north of ranges 5 and 6 east, numbering —— in all, and having an aggregate acreage of 330.48 acres, which rights of way are below particularly described by reference to the grants thereof.

(*d*) Certain contracts from the owners of land lying above said dam granting permission to said Woodbridge Canal and Irrigation Company, as assignees, to construct, maintain, etc., said dam in said river, to wit:

(*e*) Certain parcels of real property, situate and being in said county of San Joaquin and bounded and particularly described as follows:

(1) Being (1) small piece of land adjoining block 2 in the
198 town of Woodbridge, known as the "Mill property," being the land on which was erected the old flour-mill and building heretofore sold to C. C. Blair and further described as lots 4, 5, and 6 in block "F" of Woods' survey of the town.

(2) 13.28 acres of land, situate, lying and being in said San Joaquin county, on the north bank of Mokelumne river immediately opposite said town of Woodbridge and immediately adjoining the said dam of the said Woodbridge Canal and Irrigation Company, and known as and called the "Cowboy Tract."

(3) Certain lands along the north side of river adjoining the dams and works of said Company at Woodbridge, and lying on the north side of said Mokelumne river—comprising in all 96.95 acres, and known as the "Journey Purchase."

(4) Those certain bottom lands situate in said county of San Joaquin, and described as fractions Nos. 1 and 2 and the east half of the southwest quarter of section 32, township 4 north, of range 7 east, M. D. B. & M.

(*f*) Those three certain water rights and locations on the Mokelumne river, at said Woodbridge, notices of which said locations were posted by Bryon D. Beckwith on the bank of said river on the 22d, 23d and 30th days of December, 1898, respectively, and filed in the office of the county recorder of San Joaquin County aforesaid, on the 31st day of December, 1896.

(*g*) Those three certain water locations and claims to water flowing in the Mokelumne river particularly described as follows, to wit:

199 1. A claim to said water to the extent of 250,000 cubic inches per second at the point of the north bank of the said river at 250 feet above and to the opposite side of where Green's mill formerly stood in the town of Woodbridge—notice of which bearing date the 19th day of May, 1890, and recorded May 20th, 1890, in book "G," volume 8, page 251, Miscellaneous Records of San Joaquin County, in the office of the county recorder of said county.

2. A claim by one H. B. Perkins to said water to the extent of 345,600 inches at the point where notice in writing was duly posted, that point being a pine tree on the south bank of said river near a suspended water-pi*p*e which leads across said river. Said notice bearing date November 6, 1890, recorded November 30, 1890, in book "L" of Mining Claims, pages 544 and 545, in the office of the county recorder of Calaveras County.

3. A claim to said water to the extent of 400 cubic feet per second at the point where notice was duly posted in writing by Byron D. Beckwith, that point being on the north bank of the Mokelumne river, on a live-oak tree about 300 feet north of a suspension pipe across said river; said notice being dated January 23d, 1892, and recorded January 26, 1892, in book "A" of Water Rights, page 186, in the office of the county recorder of Amador County.

(*h*) All those certain pieces and parcels of land being in the counties of Calaveras and Amador, and bounded and particularly described as follows, to wit:

200 The fractional southeast quarter of the southeast quarter of section 33, and fractional northwest quarter of the southwest quarter of section 34, township 5 north of range 10 east M. D. B. and M., more particularly described in that deed made by Byron D. Beckwith to the Woodbridge Canal and Irrigation Company on the 8th day of February, A. D. 1894, and recorded on the 27th day of June, 1894, in book "A," volume 83, page 78 of Deeds, San Joaquin County records, and recorded in volume 10 of Deeds, at page 269 of the records of Amador County.

The said parcels of land containing in all 46.61 acres.

(*i*) All that certain right of way across a strip of land granted by J. J. Hinckley and wife to the Woodbridge Canal and Irrigation Company, along and over certain lands of said Hinckley from the county road to the land acquired by said Woodbridge Canal and

Irrigation Company on the 8th day of February, 1894, from Byron D. Beckwith hereinbefore in this schedule mentioned.

The following is a list of the rights of way referred to in paragraph (*e*) page 19 of this decree:

1. A right of way 100 feet wide, as described in a deed from Sidney Newell to the Woodbridge Canal and Irrigation Company, dated March 21st, 1892, recorded in book "A," vol. 58 of Deeds (Highways), page 207, records of San Joaquin County, to which deed and the record thereof reference is hereby made for more particular description.

2. A right of way 100 feet wide, as described in a deed from Robert Boyce, Amos Boyce and John Boyce to the Wood-
201 bridge Canal and Irrigation Company, dated April 4th, 1890, and recorded in book "A," vol. 58 of Deeds, at page 110, records of San Joaquin County, to which deed and the record thereof reference is hereby made for more particular description.

3. A right of way 100 feet wide, as described in a deed from Susan A. Deady and Susan A. Deady, as guardian of the person and estate of John Deady, an incompetent person, to the Woodbridge Canal and Irrigation Company, dated June 23d, 1890, and recorded in book "A," vol. 58 of Deeds, page 136, records of San Joaquin County, to which deed and the record thereof, reference is hereby made for more particular description.

4. A right of way 100 feet wide, as described in a deed from R. J. Parsons to the Woodbridge Canal and Irrigation Company, dated March 24th, 1890, and recorded in book "A," vol. 58 of Deeds, page 113, records of San Joaquin County, to which deed and the record thereof reference is hereby made for more particular description.

5. A right of way 100 feet wide, as described in a deed from M. A. Shinn to the Woodbridge Canal and Irrigation Company, dated April 4th, 1890, recorded in book "A," vol. 58 of deeds, page 112, records of San Joaquin County, to which deed and the record thereof reference is hereby made for more particular description.

6. A right of way 100 feet wide, as described in a deed from Robert Boyce to the Woodbridge Canal and Irrigation Company, dated March 24th, 1890, recorded in book "A," volume 73 of
202 Deeds, page 105, records of San Joaquin County, to which deed and the record thereof reference is hereby made for more particular description.

7. A right of way 100 feet wide as described in a deed from John Boyce and Amos Boyce to the Woodbridge Canal and Irrigation Company, dated March 24th, 1890, and recorded in book "A," vol. 58 of Deeds, page 109, record of San Joaquin County, to which deed and the record thereof, reference is hereby made for more particular description.

8. A right of way 100 feet wide as described in a deed from R. W. Williams to the Woodbridge Canal and Irrigation Company, dated December 9th, 1889, recorded in book "A," vol. 58 of Deeds, page 118, records of San Joaquin County, to which deed and the record thereof reference is hereby made for more particular description.

9. A right of way 50 feet wide as described in a deed from

J. A. Sollinger to the Woodbridge Canal and Irrigation Company dated March 24th, 1890, recorded in book "A," vol. 58 of Deeds, page 132, records of San Joaquin County, to which deed and the record thereof reference is hereby made for more particular description.

10. A right of way 50 feet wide as described in a deed from A. H. Randall to the Woodbridge Canal and Irrigation Company, dated December 30th, 1889, recorded in book "A," vol. 58 of Deeds, page 131, Records of San Joaquin County, to which deed and the
203 record thereof reference is hereby made for more particular description.

11. A right of way 50 feet wide as described in a deed from N. N. Laufenberg to the Woodbridge Canal and Irrigation Company dated December 19th, 1889, recorded in book "A," vol. 58 of Deeds, page 128, records of San Joaquin County, to which deed and the record thereof reference is hereby made for more particular description.

12. A right of way 50 feet wide as described in a deed from R. E. Wilhoit and Joseph Quillen to the Woodbridge Canal and Irrigation Company, dated December 19th, 1889, recorded in book "A," vol. 58 of Deeds, page 140, records of San Joaquin County, to which deed and the record thereof reference is hereby made for more particular description.

13. A right of way 50 feet wide as described in a deed from R. E. Wilhoit to the Woodbridge Canal and Irrigation Company, dated December 13th, 1889, recorded in book "A," vol. 58 of Deeds, page 139, records of San Joaquin County, to which deed and the record thereof reference is hereby made for more particular description.

14. A right of way 50 feet wide as described in a grant from Louis Voucher to B. A. Laws, and a transfer thereof from said B. A. Laws to the Woodbridge Canal and Irrigation Company, dated October 27th, 1890, and which grant and transfer were recorded in book "G," vol. 8 of Miscellaneous, page 180, records of San Joaquin County, to which grant and transfer and the record thereof
204 reference is hereby made for more particular description.

15. A right of way 100 feet wide as described in a deed from F. T. Baldwin, C. B. Hart, J. C. Campbell, Joshua Chadborne, H. Arandt, and L. N. Shippee to the Woodbridge Canal and Irrigation Company, dated May 14th, 1890, recorded in book "A," vol. 58 of Deeds of Highway, at page 92, records of San Joaquin County, to which deed and the record thereof reference is hereby made for more particular description.

16. A right of way 100 feet wide, as described in a deed from A. N. Harshner to the Woodbridge Canal and Irrigation Company, dated April 2, 1890, recorded in book "A," vol. 58 of Deeds, page 107, records of San Joaquin County, to which deed and the record thereof reference is hereby made for more particular description.

17. A right of way 100 feet wide as described in a deed from Elvira Franklin to the Woodbridge Canal and Irrigation Company, dated April 4, 1890, recorded in book "A," vol. 58 of Deeds, page 120, records of San Joaquin County, to which deed and the record thereof reference is hereby made for more particular description.

18. A right of way 50 feet wide as described in a deed from Jacob Beschofberger to the Woodbridge Canal and Irrigation Company, dated April 2, 1890, recorded in book "A," vol. 58 of Deeds, page 122, records of San Joaquin County, to which deed and the record thereof reference is hereby made for more particular description.

205 19. A right of way 100 feet wide as described in a deed from R. J. Parsons to the Woodbridge Canal and Irrigation Company, dated April 2d, 1890, recorded in book "A," vol. 58 of Deeds, page 115, records of San Joaquin County, to which deed and the record thereof reference is hereby made for more particular description.

20. A right of way 100 feet wide as described in a deed from John N. Posey and Jacob Dornbach to the Woodbridge Canal and Irrigation Company, dated April 4th, 1890, recorded in book "A," vol. 58 of Deeds, page 123, records of San Joaquin County, to which deed and the record thereof reference is hereby made for more particular description.

21. A right of way 50 feet wide as described in a deed from Jacob Engelandt to the Woodbridge Canal and Irrigation Company, dated April 3d, 1890, recorded in book "A," vol. 58 of deeds, page 125, records of San Joaquin County to which deed and the record thereof reference is hereby made for more particular description.

22. A right of way 50 feet wide as described in a deed from R. W. Williams to Woodbridge Canal and Irrigation Company, dated March 5th, 1892, recorded in book "A," vol. 58 of Deeds, page 185, records of San Joaquin County, to which deed and the record thereof reference is hereby made for more particular description.

23. A right of way 50 feet wide as described in a deed from Thomas R. Burkett to the Woodbridge Canal and Irrigation Company, dated March 5th, 1892, recorded in book "A," vol. 58
206 of deeds, page 187, records of San Joaquin County, to which deed and the record thereof reference is hereby made for more particular description.

24. A right of way 150 feet wide, as described in a deed from John Perrott to the Woodbridge Canal and Irrigation Company, dated March 14th, 1890, recorded in book "A," vol. 58 of Deeds, page 99, records of San Joaquin County, to which deed and the record thereof reference is hereby made for more particular description.

25. A right of way 100 feet wide, as described in a deed from Mary J. Taylor to the Woodbridge Canal and Irrigation Company, dated March 26th, 1890, recorded in book "A," vol. 58 of Deeds, page 149, records of San Joaquin County, to which deed and the record thereof reference is hereby made for more particular description.

26. A right of way 100 feet wide, as described in a deed from H. C. Gillingham to the Woodbridge Canal and Irrigation Company, dated March 29, 1890, recorded in book "A," vol. 58 of Deeds, page 100, records of San Joaquin County, to which deed and the record thereof reference is hereby made for more particular description.

27. A right of way 100 feet wide, as described in a deed from David Housh to the Woodbridge Canal and Irrigation Company, dated March 28th, 1890, recorded in book "A," vol. 58 of Deeds, page 160, records of San Joaquin County, to which deed and
207 the record thereof reference is hereby made for more particular description.

28. A right of way 100 feet wide, as described in a deed from Margaret Copse to the Woodbridge Canal and Irrigation Company, dated March 31st, 1890, recorded in book "A," vol. 58 of Deeds, page 155, records of San Joaquin County, to which deed and the record thereof reference is hereby made for more particular description.

29. A right of way 100 feet wide, as described in a deed from Henry Beckman to the Woodbridge Canal and Irrigation Company, dated September 2d, 1890, recorded in book "A," vol. 58 of Deeds (Highway), page 202, records of San Joaquin County, to which deed and the record thereof reference is hereby made for more particular description.

30. A right of way 100 feet wide, as described in a deed from Mary Beckman to the Woodbridge Canal and Irrigation Company, dated October 31st, 1890, recorded in Book "A" 58 of Deeds (Highway), page 205 records of San Joaquin County, to which deed and the record thereof reference is hereby made for more particular description.

31. A right of way 150 feet wide, as described in a deed from Mary Beckman to the Woodbridge Canal and Irrigation Company, dated October 31st, 1890, recorded in book "A," vol. 58 of Deeds (Highway), page 204, records of San Joaquin County, to which deed and the record thereof reference is hereby made for more particular description.

208 32. A right of way 100 feet wide, as described in a deed from Ezra Fiske to the Woodbridge Canal and Irrigation Company, dated March 26th, 1890, recorded in book "A," vol. 58 of Deeds, page 102, records of San Joaquin County, to which deed and the record thereof reference is hereby made for more particular description.

33. A right of way 100 feet wide, as described in deed from Margaret Copsey to the Woodbridge Canal and Irrigation Company, dated March 31st, 1890, recorded in book "A," vol. 58 of Deeds, page 153, records of San Joaquin County, to which deed and the record thereof reference is hereby made for more particular description.

34. A right of way 60 feet wide, as described in a deed from L. H. Shippee to the Woodbridge Canal and Irrigation Company, dated October 11th, 1893, recorded in book "A," vol. 58, Rights of Way, page 22, records of San Joaquin County, to which deed and the record thereof reference is hereby made for more particular description.

35. A right of way 100 feet wide, as described in a deed from L. M. Morse to the Woodbridge Canal and Irrigation Company, dated March 25th, 1891, recorded in book "A," vol. 58 of Deeds, page 164,

records of San Joaquin County, to which deed and the record thereof reference is hereby made for more particular description.

36. A right of way 60 feet wide, as described in a deed from C. Swain to the Woodbridge Canal and Irrigation Company,
209 dated June 2d, 1890, recorded in book "A," vol. 58, Highways, page 210, records of San Joaquin County, to which deed and the record thereof reference is hereby made for more particular description.

37. A right of way 60 feet wide, as described in a deed from Helen Weber, Julia H. Weber and C. N. Weber to the Woodbridge Canal and Irrigation Company, dated January 2d, 1894, recorded in book "A," vol. 83 of Deeds, page 175, records of San Joaquin County, to which deed and the record thereof reference is hereby made for more particular description.

38. A right of way 60 feet wide, as described in a deed from Geo. Mosher to Woodbridge Canal and Irrigation Company, dated September 15th, 1893, recorded in book "A," vol. 58 of Deeds, page 215, records of San Joaquin County, to which deed and the record thereof reference is hereby made for more particular description.

39. A right of way 60 feet wide, as described in a deed from C. Swain and George L. Hildredth to the Woodbridge Canal and Irrigation Company, dated December 1st, 1893, recorded in *ob*ok, "A," vol. 58 Highways, page 227, records of San Joaquin County, to which deed and the record thereof reference is hereby made for more particular description.

40. A right of way 50 feet wide, as described in a deed from Frank Davis to Woodbridge Canal and Irrigation Company, dated August 14th, 1894, recorded in book "A," vol. 83 of Deeds, page 133, records of San Joaquin County, to which deed and the record thereof
210 reference is hereby made for more particular description.

41. A right of way 70 feet wide, as described in deed from Frank Davis to Woodbridge Canal and Irrigation Company, dated September 7th, 1893, recorded in book "A," vol. 83 of Deeds, page 131, records of San Joaquin County to which deed and the record thereof reference is hereby made for more particular description.

42. A right of way as described in a certain grant from John Perrott and B. A. Laws, dated April 19th, 1889, and by said B. A. Laws transferred to the Woodbridge Canal and Irrigation Company October 27th, 1890, which grant and the transfer thereof is recorded in book "A," vol. 58 of Deeds, page 151, records of San Joaquin County and to which grant and transfer and the record thereof reference is hereby made for more particular description.

43. A right of way as described in a deed from Emma Metz to the Woodbridge Canal and Irrigation Company, dated December 4th, 1889, recorded in book "A," vol. 58 of Deeds, page 97 records of San Joaquin County, to which deed and the record thereof reference is hereby made for more particular description.

44. A right of way 120 feet wide as described in a deed from A. S. Thomas and Sarah E. Thomas to the Woodbridge Canal and Irrigation Company, dated November 26th, 1889, recorded in book "A," vol. 58 of Deeds, page 134, records of San Joaquin County, to which

deed and the record thereof reference is hereby made for more particular description.

211 45. A right of way 30 feet wide, as described in an agreement between the Northern Railway Company and the Woodbridge Canal and Irrigation Company, dated March 7th, 1890, recorded in book "G," vol. 8 of Miscellaneous, page 334, records of San Joaquin County, to which agreement and the record thereof reference is hereby made for more particular description.

46. A right of way for the main canal 120 feet wide, one for the north branch canal 100 feet wide, and one for the south branch canal 100 feet wide, as described in a deed from H. C. Covell to Byron D. Beckwith and B. A. Laws, dated November 2d, 1889, and by said Byron D. Beckwith and B. A. Laws transferred to the Woodbridge Canal and Irrigation Company October 27th, 1890, which deed and transfer are recorded in book "G," vol. 8, Miscellaneous, page 353, records San Joaquin County, to which deed and transfer and the record thereof reference is hereby made for more particular description.

47. A right of way 60 feet wide, as described in a deed from J. D. Peters to the Woodbridge Canal and Irrigation Company dated September 14th, 1893, recorded in book 8, vol. 79 of Deeds, page 506, records of San Joaquin County, to which deed and the record thereof reference is hereby made for more particular description.

And it is further ordered and adjudged: That said complainant do have and recover of and from the said Intervener J. C.

212 Thompson the sum of —— dollars for its costs of suit incurred in the matter of the said petition of the said Thompson.

And that said complainant do have and recover of and from the said interveners, R. Franklin, Samuel Estees, Edgar Bryant, Joseph J. Hinckley, H. H. Saunders, and J. N. Hinckley, the sum of —— dollars for its costs of suit incurred in the matter of their said petition for a mechanic's lien.

Said costs to be taxed by the clerk of this court and entered in this decree upon a verified memorandum of the amount thereof being filed herein by the complainant, or one of its solicitors; and execution shall be issued therefor by the said clerk upon the application of the said complainant.

This decree is given and made subject to modification by the court at any time before final confirmation of sale, as to the upset or minimum price at which said sale may be made, and also as to the manner of sale of personal property or choses in action or securities thereunder; and subject to the right of the Court at any time before the sale to authorize the withdrawal of choses in action and securities from sale and the settlement, compromise and cancellation thereof.

Dated this 18 day of Sept., A. D. 1897.

WM. W. MORROW,
Circuit Judge.

[Endorsed:] Filed and entered September 18th, 1897. Southard Hoffman, Clerk.

213 In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

No. 11950.

ATLANTIC TRUST COMPANY, Complainant,

vs.

WOODBRIDGE CANAL AND IRRIGATION COMPANY ET AL., Defendant and Interveners.

Decree of Confirmation of Sale.

In this case, final decree of foreclosure and sale having been heretofore duly made and entered on the eighteenth day of September, 1897, and Honorable E. H. Heacock, Master in Chancery, having in and by the said decree been duly appointed commissioner of this court to make sale of the property of the corporate defendant described in said decree, and having, under and in pursuance of the terms of said decree and the orders of the Court in that behalf duly made several times offered the said property for sale, and offered the same for sale in the mode and manner required by law and by the said decree and the orders of the Court in that behalf given and made, and on each occasion reported to the Court his proceedings in that behalf, and the bids made for such property, and none of said bids having been accepted or confirmed by the Court; and the matter having been referred to the said Commissioner, under order of the Court duly given and made, with instructions to again order
214 the said property for sale after notice duly given as in the said order provided, and the said commissioner having on the 18th day of July, 1898, after notice given as provided in said order, again offered the said property for sale, and in pursuance of said order, on or before the 25th day of July, 1898, filed in this court a report of his proceedings under said order, and of all bids offered or made for said property at the sale so held on the 18th day of July, 1898, and the same having come up for hearing before the Court on the said 25th day of July, 1898, and the hearing thereon having been then continued for one week and until the first day of August, 1898, when the hearing thereon was again continued until the eighth day of August, 1898, and the same having been duly called in its order for hearing on the said 8th day of August, 1898, all parties in interest being present by their respective counsel and solicitors, and it appearing from the said report of said commissioner that on the said 18th day of July, 1898, at the time and place appointed, the said property had again been offered for sale in the manner required by law and the orders of the Court in that behalf, and that two bids had been made therefor, viz.: One by Franklin

Davis of eleven thousand dollars in gold coin, and twenty per cent. thereof deposited in gold coin with the said commissioner, accompanied with an agreement by said Franklin Davis that in case said bid was accepted by the Court, and sale confirmed to him thereon he would pay in the balance of said sum of
215 $11,000.00 in gold coin or in default thereof forfeit the said deposit so made; and another by E. C. Chapman, the receiver, of $22,350.00, payable as follows:

By amount of claims of receiver, as allowed in and by the decree of foreclosure	$12,105.72
By amount of claims of Fox & Gray, counsel for receiver, as allowed in and by said decree	9,039.43
Balance to be paid in coin	2,354.85
Making a total of	$23,500.00

—said bid subject to a lien upon the property for all further claims fixed by the decree and allowed as and for receiver's certificates and expenses incurred by the receiver in said cause, and upon which bid the said E. C. Chapman had deposited the sum of $470.97, in cash, as and for twenty per cent. upon that part of said bid which was to be paid in cash, with an agreement that in case such bid as accepted and confirmed by the Court he would make the same good, or in default thereof forfeit the sum so deposited; and it further appearing from said report that no other or further bids had been made.

Exception and objections were then and there interposed and made to the acceptance or confirmation of each of said bids, and fully argued before the court, and after such argument the bid of said E. C. Chapman was withdrawn, and thereupon, on motion of counsel, and with the consent and approval of all the parties in interest in the cause, the Court consented to receive further bids in
216 open court, and thereupon W. B. Bradbury and E. F. Card made and filed a bid in open court, of the sum of $12,000.00 in gold coin, and deposited twenty per cent. thereof, with an agreement that in case said bid was accepted, he would pay in the balance thereof, or in default of such payment would forfeit the twenty per cent. so deposited, and Chas. N. Fox made and filed a written bid signed by himself, in words and figures as follows:

(Giving the Title of Court and Cause.)

"Now comes the undersigned and bids and offers for the property offered for sale in this cause and described in the decree of foreclosure heretofore entered herein, the sum of twenty-one thousand dollars, certificates, assignments and conveyances thereof to be made to and in the name of G. Howard Thompson, and payment of the amount so offered and bid to be made as follows:

1. Nine thousand dollars thereof by the filing and entry of good and sufficient satisfaction and discharge of the allowance made in

and by the said decree in favor of E. C. Chapman, receiver, as and for his compensation as receiver in said cause.

2. Nine thousand dollars thereof by the filing and entry of good and sufficient satisfaction and discharge of the allowance made in and by the said decree of foreclosure in favor of Fox & Gray, as and for compensation for their services as counsel for said receiver.

3. Three thousand dollars thereof in gold coin of the United States.

(Signed) CHAS. N. FOX."

217 And thereupon the Court ordered that the further hearing of the matter be continued until August 10th, 1898, at 11 o'clock A. M., to which time the Court then adjourned.

The hearing of the case being again resumed on the said 10th day of August, 1898, Mr. Fox asked leave to substitute for the bid signed and filed by him on August 8th, 1898, a duplicate thereof signed by said G. Howard Thompson in person, and leave being granted, a duplicate of the bid hereinabove last quoted signed by the said G. Howard Thompson instead of by Chas. N. Fox was presented and filled and substituted for the bid so signed by said Chas. N. Fox, and with it was presented and filed, subject to acceptance and confirmation of said bid of G. Howard Thompson, to be returned in case said bid should not be accepted and confirmed, a receipt in full for the said sum of nine thousand dollars, the allowance made in and by the said decree of foreclosure in favor of said E. C. Chapman, as and for his compensation as receiver in said cause, and also in full of the said sum of nine thousand dollars, allowance made in and by the said decree of foreclosure in favor of Fox & Gray as and for their compensation for their services as counsel for said receiver, which receipt was signed by the Bank of California by its assistant cashier, also by the said E. C. Chapman and by the said Fox & Gray; and with the said papers was also deposited, subject to acceptance and confirmation of said bid, to be returned in case the same was not accepted and confirmed, a certified check, covering the
218 amount of the cash portion of said bid and one thousand dollars in excess thereof also two hundred dollars in gold coin of the United States, making the total of said deposit of check and coin of $4,200.00, being equal to twenty per cent. upon the total amount of the bid so made as aforesaid, and accompanying the same with a written agreement made by said E. C. Chapman and Fox & Gray, who made said deposit of check and cash, that in case said bid of said G. Howard Thompson was accepted and confirmed according to the terms thereof, and default be made in complying with the terms thereof on the part of said G. Howard Thompson, then the full amount of said $4,200.00 so deposited in check and cash should be forfeited, otherwise three thousand dollars thereof to be used in complying with the terms of said bid, and the remaining $1,200.00 thereof to be returned to them.

Said Franklin Davis also made a second bid, in the sum of $12,500.00 in gold coin of the United States, with an agreement in writing to forfeit twenty per cent thereof in case said bid was not

made good, if accepted and confirmed, and deposited a certified check more than sufficient to meet the said twenty per cent. upon said bid.

No further bids being offered, and exceptions being then and there made to the acceptance and confirmation of each and every of said bids, the same were then and there argued and submitted, and it was by the Court then and there ordered and it is by the Court,

Now here ordered, adjudged and decreed, that neither of the bids made by said Franklin Davis be confirmed, and that the same
219 and each of them be not confirmed, and that the checks and money deposited by said Davis be returned to him.

And it is further ordered, adjudged and decreed, that the bid so made by said W. B. Bradbury and E. F. Card be not confirmed, and that the check deposited by said Bradbury be returned to him.

And it appearing to the Court that the said sums of nine thousand dollars allowed and decreed, in and by the said decree of foreclosure to be paid to the said E. C. Chapman, receiver, as and for his compensation as receiver, and of nine thousand dollars allowed and decreed, in and by the said decree of foreclosure, to be paid to Fox & Gray as and for their compensation as counsel for said receiver, are costs of court, entitled to priority of payment out of the proceeds of such sale next after the costs of sale; and it further appearing that no higher or better bid has been or can be secured for said property, it is by the Court further

Ordered, adjudged and decreed that the bid so made by the said G. Howard Thompson be, and the same is hereby accepted according to the terms thereof and that said property be struck off and sold to him therefor; that satisfaction and discharge of so much of said decree of foreclosure as provides that the sum of nine thousand dollars be allowed and paid to said E. C. Chapman as and for his compensation as receiver, and of so much thereof as allows and decrees that the sum of nine thousand dollars be allowed and paid to Messrs. Fox & Gray as and for their compensation for services as counsel for said receiver, and the said sum of three thousand
220 dollars in gold coin for which check was deposited as aforesaid, be accepted in satisfaction of said bid, and thereupon the balance of the money so deposited on behalf of said G. Howard Thompson, to wit, the sum of $1,200.00 so deposited to make up the twenty per cent. of the entire bid, required as security that the said bid would be made good, be thereupon returned to the parties making the deposit aforesaid.

And it is further ordered, adjudged and decreed, that the said bid so made by said G. Howard Thompson, and herein accepted and the sale so made thereunder to the said G. Howard Thompson, of all the property and franchises of the said defendant described in the said decree of foreclosure, be and the same is hereby finally and fully confirmed, and that the commissioner appointed to make the sale as aforesaid be and he is hereby ordered and directed to make, execute and deliver to the said G. Howard Thompson all necessary and proper assignments, bills of sale or other transfers of the accounts,

choses in action and other personal property included in said sale, and certificates of sale of the franchises and real property so sold, and in case redemption be not made of said property from such sale within six months from the said tenth day of August, 1898, in the manner provided by law, or if dispute arise as to the terms upon which such redemption may be made then in such manner and upon such terms as this Court shall by its order and decree adjudge and determine, the said commissioner make, execute and deliver to the said G. Howard Thompson, or his assigns, good and sufficient
221 deed or deeds of conveyance of the real property and franchise aforesaid.

And it is further ordered, adjudged and decreed, that upon demand, and presentation of the assignments, bills of sale, certificates of sale and transfers therefor, the said receiver turn over and deliver possession of the property so sold as aforesaid to the said G. Howard Thompson, or his assigns.

And it is further ordered, adjudged and decreed, that out of the money arising from and received upon such sale the clerk pay the costs of advertising and sale, including the compensation allowed to the commissioner for making such sale as fixed and established in said decree of foreclosure; the fees of the master on the reference made to him to examine and report upon the receiver's reports of receipts and expenses prior to the entry of said decree—the clerk's accruing costs and commissions, and that he apply and pay the balance, if any there be in payments pro rata on the receiver's certificates mentioned and provided for in said decree of foreclosure, such payments to be applied first to the accrued interest on said certificates respectively, and if more than sufficient to pay such accrued interest, then on account of the principal of such certificates respectively; and that said clerk report to this Court the balance due and remaining unpaid for or on account of any of the fees of officers or appointees of this Court, or of advances made by them or either of them, and for or on account of receiver's certificates or time checks or other expenses of the administration of said receiver, as
222 the same are fixed, established and allowed in and by the said decree of foreclosure, for the further consideration and action of this Court thereon; and also that the said receiver report to this Court, and render an account of his receipts, disbursements and expenses in the management and care of said property between the date of said decree of foreclosure and the date of sale, and transfer of possession thereunder, for examination and settlement.

And it is further ordered, that jurisdiction of this cause and the parties thereto be and the same is hereby retained by the Court, until redemption is made or title deeds have passed as herein provided, and until the coming in of the reports of the said clerk and receiver herein provided for, and the final action of the Court thereon, and the final payment of the balance of the costs and expenses of this court and its officers, and of the advances made and indebtedness incurred by said receiver which have been or may be allowed by the Court, in the management and care of the property placed in his

charge, or until the further and final order of the Court in that behalf.

August 15, 1898.

WM. W. MORROW,
Circuit Judge.

[Endorsed:] Filed and entered August 15, 1898. Southard Hoffman, Clerk.

223 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 11950.

ATLANTIC TRUST COMPANY
vs.
WOODBRIDGE CANAL AND IRRIGATION COMPANY.

Report of Clerk Pursuant to Decree of August 15, 1898.

To the Honorable William W. Morrow, United States Circuit Judge:

In obedience to the decree of confirmation of sale, filed August 15th, 1898, I respectfully report that the following payments have been made from the proceeds of sale under decree of foreclosure:

Proceeds of sale		$21,000.00
The receiver for his compensation	$9,000.00	
Messrs. Fox & Gray, as attorneys' fees	9,000.00	
E. H. Heacock, Commissioner, etc	500.00	
E. H. Heacock, Master, etc	50.00	
Advertising bills	1,737.60	
Stenographers' fees	20.00	
Clerk's Costs	201.70	
Pro rata payment on the accrued interest on the receiver's certificates	490.70	
	$21,000.00	$21,000.00

224 I further report that of the amounts found due by the decree of foreclosure of September 18, 1897, there remains still unpaid:

Receiver's certificates	$12,292.47
E. C. Chapman, Esq., receiver for advances made by him, care and management of property	3,105.72
Time checks issued by receiver	5,728.89
Work done and material furnished for said receiver, for which no time checks or certificates have been issued	2,269.85
Expenses operating canal system	5,728.54

W. C. Pidge	1,801.37
F. C. McClelland	922.12
Scrivner & Schell and John B. Hall	9,000.00
E. P. Cole	2,000.00
	$42,848.96

Sept. 7th, 1898.

Respectfully submitted,

SOUTHARD HOFFMAN,
Clerk U. S. Circuit Court, Northern District of California.

[Endorsed:] Filed September 7, 1898. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

225 In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

In Equity.

THE ATLANTIC TRUST COMPANY, Complainant,
vs.
WOODBRIDGE CANAL AND IRRIGATION COMPANY, Defendant.

Final Report and Petition of Receiver.

To the Honorable the Justices of the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California:

Now comes E. C. Chapman, receiver appointed by the Court in the above-entitled cause, and makes and submits this his final report in said cause, as follows:

As shown by the records and files of the court in this cause, decree of foreclosure and sale was duly given and made in said cause on the 18th day of September, 1897, and the commissioner appointed to make sale thereunder promptly qualified and proceeded to the performance of the duty assigned him, but although the most diligent effort was made, and a large expense incurred, in trying to effect a sale, no sale was finally made of the property at a price satisfactory to either the parties in interest or the Court until the 10th day of August, 1898, when the property was struck off and sold to G. Howard Thompson for the sum of $21,000.00, that being
226 the highest and best bid made therefor, and decree of confirmation of such sale, subject to redemption within six months as provided by the laws of the State, was duly given and made on the 15th day of August, 1898, and certificates of such sale duly executed and delivered and filed.

That from the date of said decree to the date of said sale, and the confirmation thereof, and the issue of certificate of sale thereunder,

full eleven months, it was necessary that said receiver should, and he did remain in full and absolute charge and possession of said mortgaged property, and although he did not attempt during that period to keep it a going concern, as he had theretofore done, it was necessary to give, and he did give, the matter his personal attention from time to time, and to make, and he did make three visits of inspection to the property, at an expense of $47.40 actually paid out; and it was also necessary, during the whole of that time, in order to preserve the property, franchises and water rights subject to the mortgage, and so decreed to be sold it was necessary that the receiver should keep, and he did keep two men employed—one at the headquarters of said works at Woodbridge, and one at the upper water right in Calaveras county from the date of said decree, or rather from the date of his report upon which said decree was founded, and the day when said decree was ordered prepared, which was August 9th, 1897, to the date of said sale—Twelve months, at a cost of $75 per month, or $900 each; and he also necessarily incurred
227 other expenses in the care and management of said property during said period, as shown in his statement of account, hereinafter given. During all that time, also, his counsel was engaged, and continued to look after the matter, and was frequently consulted by said receiver upon questions of law which arose in the conduct and management of the business, and, on behalf of the receiver in endeavoring to secure and protect the interests of all parties interested, and to secure a legal and regular sale of the property at the best price possible, and in that behalf prepared and filed many papers in the cause, and had and attended many hearings and arguments before the Court, all to the end of securing the best possible sale of the property for the benefit of the parties in interest, and the protection of the officers of the court and their employees from loss thereunder, all of which appears by the records and files of the Court in this cause.

Pending the sale of such property, and on the first of February, 1898, under authority given by order of court made on that day, I sold and assigned a note and mortgage given by Thomas E. Jones to the said Woodbridge Canal and Irrigation Company, dated June 25th, 1894, for the sum of $500 cash, which I received, out of which I returned the sum of $175, money which I had received on account of interest on another mortgage which had come into my possession as receiver and which I had supposed belonged to the assets of the Woodbridge Canal and Irrigation Company at the time of making my former report in this cause, but which had in fact been assigned and transferred by the Woodbridge Canal and Irrigation
228 Company before my appointment as receiver, leaving a balance of the moneys so received by me of $325.

Since my last report I have paid out to and for F. G. McClelland on account of services rendered by him, the sum of $772, leaving a balance of $128 still due him on account of services so rendered since my last report, and in addition to the sum of $300 due to him for services prior to my last report and allowed in and by the decree of foreclosure entered herein.

My disbursements and receipts, since the date of my report upon which the said decree was based, have been as follows:

Disbursements.

Interest erroneously collected, as above stated	$175.00
Paid F. G. McClelland on account of services rendered	772.00
Paid costs and expenses of witnesses before the Commissioner on settling my former account	35.00
Paid expenses of three trips made by myself to the works	47.40
Total	$1,029.40
Receipts	$500.00
—which being deducted from my disbursements leaves balance due on account of expenses	$529.40

229 There is also a balance due to said F. G. McClelland on account of services rendered since my last report of $128.00, and also due J. J. Hinckley for services since my last report of $900.00.

To these should also be added such reasonable sum as the Court shall deem to be just for my services as receiver for the period of twelve months from the date of my last report.

And also to my counsel, Chas. N. Fox, such reasonable sum as to the Court shall deem proper and just for his services during the same period.

It also appears from the report of the clerk of this court, made in pursuance of the order of confirmation of such sale, that there is a deficiency on account of the costs and expenses incurred by the receiver prior to the entry of said decree of foreclosure, and which were allowed and established by the said decree, in the following sums, to wit:

On account of receiver's certificates outstanding	$12,292.47
In favor of this receiver for advances	3,105.72
On account of time checks issued by receiver and now outstanding	5,728.89
On account of work done and material furnished, for which no time checks or receiver's certificates were issued	2,269.85

Of this amount the sum of $10,265.15 (being the principal due upon said receiver's certificates) bears interest at the rate of ten per cent. per annum from the date of said decree, and the balance
230 of said several sums bears interest at the rate of seven per cent. per annum from the date of said decree.

And the said receiver reports and avers that each and all and every of the foregoing items of expenditure and of the several sums of money hereinbefore mentioned are costs and expenses of this court and its officers necessarily incurred in the prosecution of said action and for which the plaintiff in said action is primarily reliable

under the laws of the United States and of the State of California, and the rules and practice of the court; that they were incurred on the motion and the request of the said plaintiff; that of right they should have been paid in advance by the said plaintiff, but upon the assurance of said plaintiff that the property against which it was seeking to foreclose was amply sufficient to pay all the costs and expenses so incurred, and the whole amount of the indebtedness for which said action was brought, they were not so paid but were left to be paid out of the funds arising from the sale of said property; that the proceeds of such sale were wholly insufficient to pay even the costs and expenses of the court in that behalf and that after applying the proceeds of sale to the satisfaction of the costs and expenses of sale, and of the compensation allowed to the said receiver and his counsel in and by the said decree of foreclosure, as authorized by the Court, the amounts hereinbefore stated remain still unpaid and entirely unsatisfied.

Wherefore your petitioner, the said receiver, prays this Honorable Court that the balance due him on account of his receipts
231 and disbursements since the making of said decree, and also the balance due to his employees as hereinbefore stated since the making of the report upon which said decree was based, and the compensation to be allowed to the said receiver, and to his counsel since the date of said decree, be fixed and established by this Court, and that judgment be entered in favor of this receiver, or of the clerk, or such other officer of the court as the Court shall direct, against the plaintiff in this cause for the full amount of the deficiency hereinbefore stated, with the sums so allowed for services and expenses since the date of said decree, and that the proper process of Court be issued for the collection thereof from plaintiff, and that when collected the same be paid into court to be by the Court disbursed to the several persons entitled thereto.

And your petitioner, the said receiver, for other, further and different reasons why the said plaintiff should be compelled to pay all the costs and expenses of the court and its officers and receiver in the above-entitled cause further shows and avers;

That this action was brought by the plaintiff for the purpose of foreclosing a certain mortgage or trust deed made by the Woodbridge Canal and Irrigation Company to the said Atlantic Trust Company bearing date on or about the 17th day of July, 1891, and duly authorized by the said Woodbridge Canal and Irrigation Company a copy of which mortgage or trust deed is attached to said plaintiff's bill of complaint in this cause, and is now here referred to as if made a part of this report and petition. That said mortgage was
232 given to the said Atlantic Trust Company as trustee for the bondholders to secure the payment of a series of one hundred bonds issued by the said Woodbridge Canal and Irrigation Company for the sum of one thousand dollars each, payable in the year 1901, at the office of the said Atlantic Trust Company, with interest thereon at the rate of six per cent. per annum, payable semi-annually, at the same place on the first day of March and first day of September in each year; that under and by the provisions of Article

Fifth of said mortgage or trust deed, it was provided that in case the said mortgagor should "for the space of six months, make default in payment of said semi-annual interest to become due on any, either, or the whole of said mortgage bonds, then after the expiration of said six months from the time it became due, and without demand or notice, at the election or option of the majority in interest of the holders of said bonds then issued and outstanding expressed in writing, the whole principal sum mentioned in each and all of said mortgage bonds then outstanding, shall forthwith become due and payable, and the lien and encumbrance hereby created for the security and payment thereof may at once be enforced."

That in and by Article Sixth of said mortgage or trust deed it was provided as follows: "It is further agreed in case of default in the payment of the semi-annual interest of the said bonds for the space of six months, or of any tax or assessment for the same period, that the trustee and its successors are hereby expressly authorized
233 and empowered, upon the request in writing of the owners or holders of the majority of said bonds, then outstanding, or if the principal of the bonds shall be due, upon the request of the holders of a majority of the bonds outstanding, to enter into and upon, and to take actual possession of all the property, real and personal, and rights, franchises and privileges of the premises hereby conveyed, and each and every part thereof, and by themselves, or by their attorneys or agents, have, hold, use and enjoy the same, and from time to time make all repairs and replacements, and all useful alterations, additions and improvements thereto, as fully as the Company might have done before such entry, and to collect and receive all tolls, incomes, rent, issues and profits of the same and of every part thereof. The trustee and its successor or successors shall and may, and hereby are expressly authorized and empowered on such default to sell at public auction, to the highest bidder, the entire property, real and personal, rights, franchises and privileges herein conveyed. Said sale shall be held either in the city of Stockton, or the city of San Francisco. At least two months' notice shall be given of the time, place and terms of said sale, by advertising the same in one or more newspapers of good circulation, in the city of San Francisco, and wherever else required by law, and continuing such advertisement at least once a week, until the time of sale; and the trustee may, at its discretion, adjourn said sale from time to time, giving reasonable notice of the time and place where it will take place, and as the attorney or attorneys in
234 fact of the Company, or its successors and assigns, shall have full power and authority to make, execute and deliver to the purchaser or purchasers thereof good, valid and sufficient deed or deeds, conveyance or conveyances, assignments or transfers, in fee simple or otherwise, of the entire property herein conveyed, and all the rights, franchises and privileges of the Company, or its successors or assigns, which conveyance or conveyances, transfer or deeds shall vest in the purchaser or purchasers all the right, title, interest and estate whatsoever, reversionary, or in possession, or

which they may be entitled to receive, have or hold of the Company; and said sale shall be a complete and perpetual bar or estoppel, both in law and in equity, against the Company, its successors and assigns, and all persons or parties lawfully claiming by, from or under it or then, in anywise or manner whatsoever; and the said Company hereby covenants and agrees to waive, and expressly covenants and agrees that neither this Company, nor its successors, shall have, or claim any advantage of any valuation, appraisement or extension."

That in and by Article Seventh of said mortgage or trust deed it was provided as follows:

"Out of the moneys received from any tolls, income, rents, profits and earnings of said canal and premises, or out of the proceeds of said sale, so to be made as aforesaid, or the Sinking Fund above provided for, after first deducting the expenses, dis-
235 bursements, costs, charges and counsel fees, incurred in and about the conducting of said sale, or the working and operating said canal, including the compensation and commission of said Trustee in and about the execution of this trust, and all expenses of repairs, replacements, alterations, additions and improvements, and all payments for taxes, assessments, charges or liens on said premises, or any part thereof, the Trustee shall, if the amount be sufficient for that purpose, pay said mortgage bonds, or so many of them as shall be outstanding and unpaid, together with all interest then due upon the same; and if the amount be insufficient, then it shall divide the same pro rata among the outstanding bonds, and the surplus of all such moneys or proceeds of sale, if any there be, shall be paid to the Company, or its successors or assigns."

That in and by Article Eighth of said mortgage or trust deed it was provided as follows:

"Nothing herein shall be construed as limiting the right of the trustee to apply to any competent court for a decree of foreclosure and sale under this indenture, or for the usual relief in such proceedings, and the said Trustee, or its successor, may, in its discretion, so proceed."

That in and by Article Ninth of said mortgage or trust deed it was provided as follows:

"In case it shall be required by the holders of bonds secured by this indenture to enforce any of their rights hereby secured, the said Trustees shall not be required to incur any expense or liability
236 in connection therewith, until satisfactorily indemnified therefor, and all powers in these presents conferred upon the Trustee (except as otherwise herein specifically provided) shall be deemed discretionary, and it shall incur no liability in exercising or declining to exercise such discretionary powers, provided it acts in good faith in regard thereto."

And your petitioner, the said Receiver, upon and according to his information and belief further avers and shows, that up to September 28th, 1894, only five days before this action was commenced, the said Woodbridge Canal and Irrigation Company had never in fact sold any of said bonds, but the title to the same still remained in the

said corporate defendant Woodbridge Canal and Irrigation Company; that in lieu of selling said bonds and thereby raising money to carry on its business said Woodbridge Canal and Irrigation Company had borrowed large sums of money on its promissory notes bearing interest at the rate of eight per cent per annum and hypothecated the majority of said bonds with the holders of said notes as collateral security for the payment thereof at the rate of about two dollars and a half for each dollar so borrowed; and the remainder of said bonds which the Court upon the trial of said cause found to be outstanding were, as the Court found, and so decreed, pledged as collateral security to other creditors of the said Woodbridge Canal and Irrigation Company for work and labor and material furnished to said corporate defendant; that on the 28th day of September, 1894, at
237 a meeting of the board of directors of said corporate defendant, they authorized the sale and exchange of said bonds so hypothecated as last aforesaid to and with the parties so holding the same as collateral security for work and labor and materials furnished as aforesaid at and for the price of seventy-five cents on each dollar of the par value of the bonds so pledged; that the said corporate defendant did not in fact default on the interest upon its bonds prior to September 1st, 1894, and no notification of defalcation in the payment of interest on said bonds was ever given by the holders thereof to the plaintiff prior to the commencement of this action, but at a meeting of the board of directors of the said corporate defendant Woodbridge Canal and Irrigation Company held at the office of the Company on the first day of October, 1894, the said corporate defendant Woodbridge Canal and Irrigation Company, by its board of directors, declared its inability to pay the interest upon said bonds falling due September 1st, 1894, or any of its other indebtedness, and that it was unable and would continue unable to pay the same at any time within six months from that date, and undertook by resolution passed by said board to waive the conditions and provisions specified or provided in Article Fifth of the deed of trust aforesaid, and authorized and requested the said Atlantic Trust Company, the plaintiff herein, immediately to commence suit in equity for the purpose of foreclosing the said mortgage and have a receiver appointed in said cause, as was subsequently done on the 3d day of October, 1894; that upon the filing of said complaint the said defendant
238 Woodbridge Canal and Irrigation Company voluntarily appeared in said cause by counsel and consented to the appointment of receiver in this cause; that no request in writing, or otherwise, was ever made to the said plaintiff by the holders of bonds secured by said mortgage that the same be foreclosed, but the said plaintiff immediately and in compliance with the request of said corporate defendant commenced this action and procured the appointment of receiver as aforesaid, with an order of Court to manage and carry on the property as a going concern, and without paying any of the costs or expenses of managing or carrying on the property, but so conducting the case as to secure the same to be done by the officers and appointees of the court, without any knowledge on the part of the Court or its officers that the plaintiff was so acting collu-

sively with the said corporate defendant, kept the property in court and managed as aforesaid for three years before it took its decree of foreclosure, and involved the Court and its officers and receiver in all the expenses hereinbefore mentioned, in addition to such as have been paid out of the proceeds of the sale which was finally made in the premises. Wherefore your petitioner, the said receiver, upon and according to this information and belief avers the said action was fraudulent and collusive as between the said plaintiff and the said corporate defendant, and the proceedings had therein, by reason whereof the costs and expenses for which your petitioner now prays judgment against the said plaintiff were incurred, were a fraud
239 upon the court and upon its officers, and the said plaintiff was and is liable in law and in equity for the payment of the same.

And your petitioner, the said receiver, upon and according to his information and belief further avers that the said corporate defendant, the Woodbridge Canal and Irrigation Company, is insolvent and unable to respond to any judgment for deficiency that has been or may be entered in this cause.

Wherefore your petitioner, the said receiver, prays the Court for the judgment and relief hereinbefore mentioned.

FOX & GRAY,
Attorneys for said Receiver.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

E. C. Chapman, being duly sworn, upon his oath says: That he is the receiver in the above-entitled cause and the petitioner in the foregoing petition; that he has heard read the said report of his account and proceedings as such receiver and all the averments of said petition and knows the contents thereof and that the same is true of his own knowledge except so far as the same are stated to be on his information or belief and as to those matters he believes it to be true.

E. C. CHAPMAN.

Subscribed and sworn to before me this 3d day of August, 1899.

[SEAL.] SOUTHARD HOFFMAN, *Clerk.*

240 [*Enclosed:*] Filed August 3d, 1899. Southard Hoffman, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 11950.

ATLANTIC TRUST COMPANY, Plaintiff,
vs.
WOODBRIDGE CANAL AND IRRIGATION COMPANY, Defendant.

Order to Show Cause on Petition of Receiver.

On reading and filing the final report and petition of the receiver heretofore appointed in the above-entitled cause, and the report of the clerk showing the amount of deficiency in the costs of court and its officers, after distribution of the fund derived from the sale of the mortgaged property mentioned in the complaint in this cause—

It is now here ordered that the Atlantic Trust Company, plaintiff in the above-entitled cause, appear and show cause in this court at the courtroom thereof, in the Appraisers' Building, in the city and county of San Francisco, on Monday the 11th day of December, A. D. 1899, at eleven o'clock A. M., or as soon thereafter as counsel can be heard, why the amount due to the receiver and his employees under his final report should not be settled and allowed, and
241 why judgment for the total amount of such deficiency, when ascertained, should not be entered against the said Atlantic Trust Company, plaintiff in said cause, and why said plaintiff should not be required to pay the same into court as in the said petition prayed.

Let a copy of this order and of the said petition be served upon the counsel of plaintiff not less than ten days before said day of hearing.

Dated this 18th day of November, 1899.

WM. W. MORROW, *Judge.*

[Endorsed:] Service of copy of the within is hereby admitted this 18th day of November, 1899, together with copy of final report of receiver. J. J. Scrivner, Geo. W. Schell, Jno. B. Hall, Attorneys for Compl'ts. Filed November 18th, 1899.

SOUTHARD HOFFMAN, *Clerk.*

242 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THE ATLANTIC TRUST COMPANY, Complainant,
vs.
WOODBRIDGE CANAL AND IRRIGATION COMPANY, Respondent.

Demurrer of Complainant to Receiver's Report and Motion for Judgment.

Now comes the said complainant, The Atlantic Trust Company, a corporation, and by protestation, not confessing or acknowledging

all or any of the matters and things in the final report and motion for judgment of E. C. Chapman, receiver in the above-entitled cause, therein contained to be true, in such manner and form as the same are therein set forth and alleged, as to so much of said report and motion for judgment as seeks to have a judgment entered against the complainant above named for various items of costs and expenditures of the receiver pending his administration as such receiver, and for the receiver's certificates issued by him as such receiver, the said complainant doth demur thereto, upon the grounds hereinafter stated, to wit:

I.

That it appears from said report and motion for judgment and the facts therein set forth that the Court has no jurisdiction to
243 grant the relief prayed for in and by said report and motion for judgment, or any part thereof.

II.

That said report and motion for judgment does not state facts sufficiently to justify the Court in granting the relief prayed for in and by said report and motion for judgment, or any part thereof.

III.

That it appears in and by said report and motion for judgment that all of the matters and things therein set forth have been adjudicated by this Court in and by the final decree entered in said cause, and that this Court has no jurisdiction to make or enter any further order or decree with reference to said matters.

IV.

And the said Atlantic Trust Company specially demurs to the item mentioned in said report and motion for judgment, as follows: "On account of receiver's certificates outstanding $12,292.47," on the specific ground that the Court has no jurisdiction to make or enter any order, judgment or decree of any nature or kind whatsoever against the said complainant for said amount, or any part thereof.

And the said complainant further specially demurs to said item upon the ground that it does not appear from said report or motion to whom said sum of money is due, or whether the parties holding the same make any claim or demand for the same, or that
244 they are seeking, or have ever sought any relief against this complainant, or that they have ever authorized or instructed the receiver, as such receiver, to apply to this court for any of the relief with relation thereto sought in and by said report and motion for judgment.

V.

And the said complainant also specially demurs to the item in said report and motion as follows: "In favor of this receiver for advances $3,105.72," upon the ground that the same is *res adjudicata*, having been allowed the receiver in the final decree entered in this cause and declared a lien upon the funds derivable from the sale of

the property in his charge as such receiver; and upon the further ground that the Court has no jurisdiction to make any further order, judgment or decree with reference thereto; and upon the further special ground that the Court has no jurisdiction to make any order, judgment or decree ordering or adjudging that this complainant pay the same, or any portion thereof.

VI.

And the said complainant further demurs to the item in said report and motion for judgment reading as follows: "On account of time checks issued by receiver and now outstanding $5,728.89," upon the specific grounds, (*a*) that no authority is shown in said receiver for the issuance of said time checks by said receiver; (*b*) that it does not appear from said report and motion who are the holders of said time checks, or whether they are seeking, or
245 have sought a judgment against this complainant for the same; (*c*) it does not appear that the said receiver has ever been requested or authorized in any manner by the holders thereof to make any claim against this complainant with reference thereto; (*d*) and upon the further ground that this Court has no jurisdiction to make or enter any order or judgment against this complainant for the same, or any portion thereof.

VII.

Said complainant also specially demurs to the item in said report and motion for judgment reading as follows: "On account of work done and material furnished, for which no time checks or receiver's certificates were issued, $2,269.85," upon the following grounds, viz: (*a*) that no authority is shown in said receiver to contract said indebtedness; (*b*) that it does not appear when said work was done or material furnished; (*c*) it does not appear who the owners of said claims are, nor whether they have ever sought, or are now seeking, or have ever authorized or instructed the receiver to seek a judgment against this complainant therefor; (b) and on the further ground that this Court has no jurisdiction to make or enter any order, judgment or decree against this complainant for the same, or any part thereof; and upon the further ground that it does not appear from said report and motion that said item of expenditure was contracted under such conditions of emergency or necessity as would make them an item of expense chargeable against the trust fund.

246 VIII.

Complainant also specially demurs to the items of $125.00 alleged to be due F. G. McClelland, and $900.00 alleged to be due J. J. Hinckley for services alleged to have been performed since the last report of said receiver, on the ground that no authority is shown in said report and motion for judgment authorizing the receiver to contract said indebtedness, nor to make the same a lien upon any of the property of said corporation, or any of the funds derived from the sale of said property; nor is any reason shown why any judgment should be rendered for the same as against this complainant;

and upon the further ground that the court has no jurisdiction to make or enter any judgment against this complainant for the same, or any part thereof.

IX.

Complainant also specially demurs to the claims of the receiver and his attorney for additional compensation for services rendered in this cause, on the grounds that both of said matters have already been adjudicated by this Court and compensation allowed both the receiver and his attorney, which has been paid, as shown by the report and motion, and the Court has no jurisdiction to allow any such additional compensation, nor to render judgment against this complainant therefor.

X.

Complainant also demurs to the statement in said report
247 and motion for judgment, to the effect that the defendant in said cause, the Woodbridge Canal and Irrigation Company had never sold any of said bonds, but on the contrary the title to the same still remain in said corporation defendant, upon the ground that the same is *res adjudicata*, and that the Court found and adjudged in its final decree entered in this cause that the said Woodbridge Canal and Irrigation Company had sold said bonds, and that such finding and decree is final upon said subject, and that the facts and circumstances in relation thereto were fully before the Court before said finding and decree were made.

XI.

Complainant also specially demurs to that portion of said report and motion for judgment wherein it is alleged that this action was collusive between the said complainant and said Woodbridge Canal and Irrigation Company, upon the ground that the facts in relation thereto as stated in said report and motion were fully set out in the pleadings and in the decree in this cause, and the Court in its final decree found said facts and adjudged by its said final decree that said action was properly brought, and that the complainant had a right to maintain said cause, and that the whole question is rendered *res adjudicata* in and by said final decree.

XII.

And this complainant doth further and generally demur to each, all and every portion of the said report and motion for judgment of the receiver herein, upon the ground that it appears affirmatively upon the face of said report and motion for judgment, as well
248 as from an inspection of the records in this cause that each and every act performed by the complainant herein has been done and performed by it in the course of the execution of a trust, and that it has well and faithfully performed its said trust, and has not failed in the execution of any of its duties under said trust, and for the said reason it is exempt from any assessment of costs against it necessarily incurred in its said duties as trustee, and that

this court is without jurisdiction to render a judgment for either or any or all of the items sought to be charged against it by said motion and report.

Wherefore, complainant asks that said motion for judgment be denied, and that the order to show cause be discharged, and that complainant be awarded its reasonable costs herein.

SCRIVNER & HOPKINS,
Solicitors for Complainant.

J. J. SCRIVNER,
Of Counsel for Complainant.

John J. Scrivner, one of the solicitors and of counsel for the complainant herein, does hereby certify that he has read and is familiar with the above and foregoing demurrer, and that the same is in his opinion well founded in point of law.

Dated December 11th, 1899.

J. J. SCRIVNER.

249 UNITED STATES OF AMERICA,
Northern District of California,
City and County of San Francisco, ss:

John J. Scrivner, of lawful age, being on his oath duly sworn, deposeth and saith: That he is a solicitor and of counsel for the Atlantic Trust Company, the complainant herein, and that he is duly authorized in the premises, and that this demurrer is not interposed for delay.

J. J. SCRIVNER.

Subscribed and sworn to before me, this 11th day of December, 1899.

[SEAL.] D. B. RICHARDS,
Notary Public in and for the City and County of San Francisco.

[Endorsed:] Service and receipt of a copy of the within demurrer admitted this 11th day of December, 1899. Fox & Gray, Attorneys for Receiver. Filed December 11th, 1899. Southard Hoffman, Clerk.

250 At a stated term, to wit, the March Term, A. D. 1901, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the city and county of San Francisco, on Monday, the 11th day of March, in the year of our Lord one thousand nine hundred and one.

Present: The Honorable William W. Morrow, Circuit Judge.

No. 11950.

ATLANTIC TRUST COMPANY
vs.
WOODBRIDGE CANAL AND IRRIGATION COMPANY ET AL.

Order Denying Receiver's Application for Order Directing Complainant to Pay Amount Due, etc.

In this cause the receiver's application (by order to show cause) for an order directing complainant to pay the amount due to receiver and his employees, etc., heretofore heard and submitted, having been fully considered, and the memorandum of opinion of the Court having been filed, it was in accordance therewith ordered that the order to show cause in this behalf issued herein be and hereby is discharged, and that receiver's said application be and hereby is denied.

251 *Mandate of United States Circuit Court of Appeals.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Honorable the Judges of the Circuit Court of the United States for the
[SEAL.] Northern District of California, Greeting:

Whereas, lately in the Circuit Court of the United States for the Northern District of California, before you, or some of you, in a cause between Atlantic Trust Company, complainant, and The Woodbridge Canal and Irrigation Company et al., defendants, No. 11,950, a decree was duly filed and entered on the 11th day of March, 1901, in favor of the said complainant and against the said defendant, which said decree is of record in the said cause in the office of the clerk of the said Circuit Court (to which record reference is hereby made and the same is hereby expressly made a part hereof), as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of an appeal agreeably to the act of Congress in such cases made and provided, fully and at large appears:

And whereas, on the 23d day of May, in the year of our Lord one thousand nine hundred and two, the said cause came on to be heard before the said Circuit Court of Appeals, on the said transcript of record, and was duly submitted:

252 On consideration whereof, it is now ordered, adjudged and decreed by this Court, that the order or decree of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs, and cause is remanded for further proceedings not inconsistent with the opinion of this Court.

Nov. 10, 1902.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in accordance with the opinion and decree of this Court, as according to right and justice and the laws of the United States ought to be had, the said decree of said Circuit Court notwithstanding.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 27th day of February, in the year of our Lord one thousand nine hundred and three.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Costs of Appellants.

Transcript, paid clerk below	$26.35
Clerk U. S. Circuit Court of Appeals	33.65
Printing record	81.25
Attorney's docket fee	20.00
Taxed at	$161.25

F. D. MONCKTON, *Clerk.*

253 [Endorsed:] Filed and spread upon Minutes U. S. Circuit Court, Northern District of California, April 10, 1903. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

ATLANTIC TRUST COMPANY,
vs.
WOODBRIDGE CANAL AND IRRIGATION COMPANY, ET AL., ETC., E. C. CHAPMAN, Receiver.

Affidavit for Order Extending Time to file Answer.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

J. J. Scrivner, being duly sworn, deposes and says: That he is the attorney of record in the matter of the application of E. C. Chapman, receiver herein for additional compensation and for other purposes; that as affiant is informed and believes, Stanley W. Dexter, of New York City, is the regular attorney and counselor of the Atlantic Trust Company, complainant, and has heretofore been advising and directing the defense of said motion; that on the 24th day of February, 1903, the Supreme Court of the United States denied the application of complainant for a writ of certiorari; that said Stanley W. Dexter

desires to prepare the answer in the case, and has been proceed-
254 ing as rapidly as possible to get the data together to prepare the same to the order to show cause herein; that only a few days ago affiant forwarded to said Dexter a part of the papers in said case in order to prepare said answer, and is to forward the remainder of the papers and records which said Dexter requires in preparing said answer.

That the attorneys for the petitioner have extended the time for complainant to file its answer until April 1st, 1903; that affiant is advised by said Dexter that it is impossible for him to get the answer ready and forwarded here by April 1st, 1903, and that he desires fifteen days further time in order that he may have ample time to get the paper together to prepare said answer.

Wherefore, affiant respectfully asks the Court to make an order extending the time to file such answer until April 15th, 1903; and further, affiant saith not.

J. J. SCRIVNER.

Subscribed and sworn to before me this 18th day of March, 1903.

[SEAL.] D. B. RICHARDS,
Notary Public in and for the City and County of San Francisco.

Order Extending Time to File Answer.

Upon reading and filing the foregoing affidavit of J. J. Scrivner, it is hereby ordered that the time within which the complainant is to file its answer to the order to show cause herein be, and
255 the same is hereby, extended to and including the 15th day of April, 1903.

March 20th, 1903.

WM. W. MORROW, *Judge.*

[Endorsed:] Received a copy of the within this 31st day of Mch., 1903. Fox & Gray, Att'ys for Receiver. Filed April 2, 1903. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States for the Ninth Circuit, Northern District of California.

THE ATLANTIC TRUST COMPANY, Complainant,
vs.
WOODBRIDGE CANAL AND IRRIGATION COMPANY, Defendant.

Answer of Complainant to Final Report and Petition of Receiver.

The complainant, The Atlantic Trust Company, a corporation now and at all times hereafter saving to itself all and all manner of benefits or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imper-
256 fections in the final report and petition of Edgar C. Chapman, receiver appointed by the Court in the above-entitled

cause contained, for the answer thereto, or to so much thereof as the complainant is advised it is material or necessary for it to make answer to, answering saith as follows:

First.

This complainant has no knowledge, information or belief whether from the date of the decree of foreclosure herein to the date of sale and the confirmation thereof and the issue of certificate of sale thereunder, it was or was not necessary that said receiver should and did remain in full and absolute charge and possession of said mortgaged property, and whether or not it was necessary to give and he did give the matter his personal attention from time to time, and to make visits of inspection to said property, and whether or not it was necessary during the whole of that time, in order to preserve the property, franchises and water rights, to keep and he did keep two men employed at a cost of $900 each, or at any other cost, and whether or not he necessarily incurred other expenses in the care and management of said property during said period or as to whether or not it was necessary for him to consult counsel upon questions of law in the conduct and management of the business and incur expense therefor. And this complainant avers that if such expenses were necessarily and properly incurred, they were incurred at the request of the receiver, upon the credit of the property of the defendant Woodbridge Canal and Irrigation Com-
257 pany solely and payable solely from the said property or the proceeds thereof, and not on the credit of this complainant nor at its request, and neither this complainant nor the said receiver is personally liable for their payment. And this complainant avers that this Court is without jurisdiction to make or enter any judgment against this complainant for the same or any part thereof.

Second.

This complainant further answering, denies that there is any sum due to said receiver, or his counsel, for their respective services for the period of twelve months from the date of the last report of said receiver nor that there should be added such reasonable sum as the Court shall deem to be just for such services; and this complainant avers that the compensation to the said receiver and to his said counsel was fixed and adjudicated by this Court in the final decree of foreclosure and sale made and entered herein on the 18th day of September, 1897, which has been paid as more fully appears by the report of the clerk filed herein on the 7th day of September, 1898, and that said compensation was fixed and determined by this Court to be in full settlement of all claims of said receiver and his counsel for services in this cause, rendered or to be rendered; and this complainant avers that all such compensation is finally adjudicated by said final decree and is *res adjudicata*, and was made payable by said decree only out of the property of the defendant, and this Court has no jurisdiction to allow any additional compensation,
258 nor to make any order, judgment or decree ordering or adjudging that this complainant pay the same or any part thereof.

Third.

This complainant further answering, admits that it appears from the report of the clerk of this court that there is a deficiency in the amounts found due by the final decree of foreclosure herein, as follows:

Receiver's certificates	$12,282.47
E. C. Chapman, Esq., receiver, for advances made by him, care and management of the property	3,105.72
Time checks issued by receiver	5,728.89
Work done and material furnished for said receiver for which no time checks or certificates have been issued	2,269.85
Making a total of	$23,396.93

That neither the said receiver's certificates nor the time checks issued by said receiver constitute nor purport to constitute any liability on the part of this complainant.

But this complainant denies that of this amount the sum of ten thousand two hundred and sixty-five dollars and fifteen cents ($10,265.15) (being the principal due upon said receiver's certificates), bears interest at the rate of ten per cent. per annum (nor at any other rate) from the date of said decree, and denies that the balance of said several sums bears interest at the rate of seven per cent. per annum (nor at any other rate) from the date of
259 said decree, and avers that all such interest (if any) on all such items was determined up to the date of said decree, and that no further interest is allowable beyond the date of said decree.

And this complainant further denies that each and all of the foregoing items of expenditure and of the several sums of money hereinbefore mentioned are costs and expenses of this court and its officers necessarily incurred in the prosecution of said action, and denies that this complainant is primarily liable therefor, nor in any other wise liable therefor, under the laws of the United States and of the State of California or either of them, or of the rules and practice of this court, and denies that they or any of them were incurred on the motions, or at the request of this complainant, and denies that of right they should have been paid in advance by this complainant, and denies that this complainant gave any assurance whatever that the property against which it was seeking to foreclose was amply sufficient to pay all the costs and expenses so incurred, and the whole amount of the indebtedness for which said action was brought, nor gave any assurance, nor made any representation whatever as to the value of said property, nor that the said receiver in any way relied upon any assurance whatever. But upon the contrary, this complainant avers that the defendant was a quasi public corporation and that all of said expenses were incurred by the receiver as the officer and hand of this Court, and not as the agent of the com-

plainant, in the operation of the canals of the defendant pur-
260 suant to the order of this Court, and were not incurred at the request of nor for the benefit of this complainant, but for the benefit of all concerned, including the public. And this complainant avers that all said items were adjudicated by this Court in and by the final decree of foreclosure entered herein, and made payable by said decree out of the proceeds of the sale of the property only, and not by the complainant personally, nor by any other person, and that the said final judgment of foreclosure is *res adjudicata* as to the method of payment of said items, and this Court has no jurisdiction to make any further order, judgment or decree with reference thereto, nor to make any order, judgment or decree ordering or adjudging that this complainant pay the same or any portion thereof.

Fourth.

This complainant further answering the final report and petition of said receiver, which purports to set out other, further and different reasons why this complainant should be compelled to pay all the costs and expenses of the court and its officers and receiver herein, admits that it is the trustee mentioned in a certain mortgage or deed of trust made by the defendant, Woodbridge Canal and Irrigation Company, bearing date the 17th day of July 1891, a copy of which is attached to the bill of complaint in this cause, and is here referred to as if made a part of this answer. But this complainant denies that said mortgage or deed of trust is fully or correctly set forth in the report and petition of the receiver herein.

261 And this complainant denies that up to September 28, 1894, the said Woodbridge Canal and Irrigation Company had never in fact sold any of said bonds, and denies that the title to the same still remained in said corporate defendant; and denies that at said date the said corporate defendant had hypothecated the majority of said bonds as set forth in said report and petition of the receiver as collateral security to the holders of its notes and to other creditors, but avers that long prior to said last-mentioned date, the majority of said bonds, to wit, sixty-six in number, of the par value of $1,000 each, were duly issued and sold by said corporate defendant to sundry *bona fide* holders thereof for money actually paid therefor and for labor done for and property actually received by said defendant, and twenty-six only of said bonds were prior to said last-mentioned date duly hypothecated to sundry creditors of said corporate defendant as collateral security for work, labor and material furnished. And this complainant avers that this Court has found and adjudged in the final decree of foreclosure herein that the said Woodbridge Canal and Irrigation Company had sold said bonds as aforesaid, being more than a majority thereof, and had duly hypothecated the balance thereof as aforesaid, and that said bonds were lawfully issued, outstanding and unpaid, and that the said mortgage or deed of trust constitutes a valid mortgage and lien upon all the property of said defendant therein described, as security for the payment of

so many of said bonds as were lawfully issued and remained
262 outstanding and unpaid; and such finding and decree are final upon said subject and all the facts and circumstances in relation thereto were fully before the Court before said finding and decree were made, and that said finding and decree are *res adjudicata* as to all questions therein.

Fifth.

This complainant further answering the said final report and petition, denies that on the 28th day of September, 1894, at a meeting of the board of directors of said corporate defendant, they authorized the sale and exchange of said bonds alleged to have been so hypothecated with the parties holding the same as collateral security; and denies that no notification of defalcation on the payment of interest on said bonds was ever given by the holders thereof to the complainant prior to the commencement of this action and denies that no request in writing or otherwise was ever made to the said complainant by the holders of bonds secured by said mortgage that the same be foreclosed and denies that it acted collusively with the corporate defendant to keep the property in court, and denies that it involved the court and its officers and receivers in all the expenses aforesaid, or that its action in the premises was in anywise fraudulent or collusive, and denies that any fraud was practiced upon the court or upon its officers, or that the complainant is in anywise liable in law or equity for the payment of said expenses.

On the contrary, this complainant avers that it at all times acted
in entire good faith for the protection of the rights of the
263 bondholders and in precise accordance with the terms of the said mortgage or deed of trust, and that each and every act performed by the complainant herein has been done and performed by it in the execution of the trust created by said mortgage or deed of trust, and that it has well and faithfully performed its trust and is not otherwise interested in this litigation, except as trustee for the holders of the bonds lawfully issued under said deed of trust.

And this complainant further avers that the holders of the outstanding bonds did present to this complainant the coupons falling due on September 1, 1894, and did demand payment thereof, and that the corporate defendant did make default in the payment of the interest on said bonds which became due and payable on September 1, 1894, and that the corporate defendant did thereafter duly waive all conditions and provisions specified in Article Fifth of the said mortgage, as conditions precedent to the enforcement of the lien created by said mortgage and that the holders of a majority of said outstanding bonds did request in writing this complainant to commence this action and did in writing express their election and option that the whole principal sum mentioned in each and all of said outstanding bonds should forthwith become due and payable, and this complainant did lawfully commence this action pursuant to the terms of the said mortgage or deed of trust, and upon the application of this complainant, this Court did on the 3d day of Oc-

tober, 1893, duly appoint Edgar C. Chapman, as receiver
264 herein.

And this complainant further avers that all the facts in relation to the issue of said bonds and the regularity and propriety of this complainant's proceedings herein were fully set out in its bill of complaint, and amended bill of complaint herein, as will more fully appear by reference thereto, on the files of this court, and this Court did by its final decree of foreclosure find said facts to be true and did adjudge that this action was properly brought and that this complainant did rightfully maintain said action and did enter judgment in all respects favorable to this complainant's demand, all of which is rendered *res adjudicata* in this court, and the receiver is estopped from questioning the regularity of these proceedings to which he owes his own appointment.

And this complainant again avers that the said judgment of foreclosure was a final adjudication in respect to all matters and things therein, and that this Court is now without jurisdiction to make or enter any judgment against this complainant for any sum whatever.

Sixth.

And further answering the petition, the complainant begs to refer to the original bill of complaint filed herein October 3, 1894, and verified by Charles P. Eells, Esq., its solicitor, in Subdivision 6, whereof the default in payment of interest on September 1, 1894, and the resolution of the board of directors of the Woodbridge Canal and Irrigation Company of October 1, 1894, declaring the inability of said company to pay further interest and waiving the
265 conditions and provisions the Fifth Article of the mortgage and requesting immediate foreclosure of said mortgage are set forth. Upon this bill of complaint the petitioner E. C. Chapman was appointed receiver of said Woodbridge Company. The order appointing him such receiver was filed herein October 3, 1894, and refers to said bill of complaint as containing the evidence upon which the said affidavit was based, and recites that the defendant Woodbridge company was present by its counsel and consented thereto. The petitioner thus received at the very moment of his appointment complete information as to the circumstances under which the foreclosure suit was instituted and the receivership constituted.

And further answering the allegations of the petition to the effect that this complainant having "commenced this action and procured the appointment of a receiver, as aforesaid, with an order of Court to manage and carry on the property as a going concern * * * kept the property in court and manage- it, as aforesaid, for three years before it took its decree of foreclosure," complainant begs to refer to the clerk's docket of the proceedings in this suit and to the various proceedings on file herein, which show the falseness of the charge that the delay in the suit was due to this complainant. As appears from said docket of proceedings, the delays were mainly due to various interventions, which raised questions requiring extended

investigation into questions of fact and arguments upon questions of law, which were taken under advisement by the Courts for
266 considerable periods of time and as to which ultimately this complainant was in part and certain of said interveners were in part successful.

The original bill of complaint herein was filed as aforesaid October 3, 1894. The first bill of intervention was filed herein by R. B. Salisbury and others December 10, 1894. This complainant demurred to said complaint, which demurrer was sustained in part and overruled in part by order entered August 6, 1895, and the interveners were given leave to reform their bill of complaint in accordance with the decision. On September 9, 1895, six of said interveners filed a reformed bill of complaint and at a later period the others of said interveners filed petitions for orders preferring them to this complainant. On December 16, 1895, this complainant was permitted to amend its complaint and at the same time to demur to the said reformed bill of complaint of interveners and to the petitions of said other interveners for a preference. On March 5, 1896, a rule was entered taking said amended bill of complaint of this complainant *pro confesso* and on March 6, the said demurrers to the claims of the interveners were argued and submitted. The decision of the Court thereon was not entered until January, 1897. It is reported at 79 Federal Reporter, 39, to which report this complainant begs to refer.

Thereafter, the allegations of fact in said reformed bill of complaint and petitions having been fully investigated, stipulations as to said facts were filed in May, 1897. The questions raised
267 by the facts so stipulated were thereupon fully argued and the decision of the Court thereon disallowing the claims set forth in said reformed bill of complaint in intervention and allowing a part only of the claims set forth in said petitions, is to be found described in the opinion rendered upon application for a final decree herein reported at 86 Federal Reporter, 975, to which this complainant begs to refer.

The next petition in intervention was that of William C. Pidge for work and labor as civil engineer, verified and filed February 4, 1895. This case was argued on or about February 18, 1895, by way of demurrer to the petition, and briefs thereon were filed during March, 1895. The case was decided in favor of Pidge on or about June 24, 1895, but the Court, as the complainant is informed and believes, declined to sign a separate decree thereon in his favor on the ground that this complainant might desire to appeal, and that the question should, therefore, be left for incorporation in the final decree in the suit. The merits of the Pidge case were reargued preparatory to the entry of a final decree as appears by the opinion thereon (86 Fed. Rep. 975), to which this complainant begs to refer. Examination of the petition of Pidge will show that upon the principles laid down in the decisions aforesaid the questions raised in this case were close and difficult.

Some time after the argument upon the demurrers to the re-

formed bill of complaint and intervening petitions upon the intervention first aforesaid, and on or about March 25, 1896, this complainant's solicitors were served with a petition by P. A.
268 Buell and Company and others claiming to be holders of twenty-six bonds secured by the mortgage upon which this suit was based, which petition prayed leave to intervene and share in the benefits of the foreclosure. The legality of these twenty-six bonds was disputed by this complainant. On or about June 12, 1896, an order was granted permitting said Buell's petition to be filed, and the petition was filed accordingly. On account of certain objections raised by this complainant, said corporation, P. A. Buell and Company, thereafter and in June, 1896, sold a portion of said bonds (which had theretofore been held by said corporation as collateral security for certain notes of the defendant Woodbridge Company) at public auction and bought them in upon said sale, and thereafter and on or about November 19, 1896, a stipulation of facts involved in said petition was made and filed, and shortly thereafter the questions raised by said stipulation were argued, resulting in a decision rendered on April 5, 1897, and decree thereon, which sustained in full the twelve bonds that had been held by the corporation of P. A. Buell and Company, subsequently bought in by said corporation, and which as to the fourteen bonds held by interveners (which were still held only as collateral security to promissory notes of the defendant Woodbridge corporation), sustained them to the extent of the advance that had actually been made thereon. The opinion of the Court upon this intervention is reported at 79 Federal Reporter, 842, to which report this complainant begs to refer.

269 While the case of P. A. Buell and Company and other interveners against this complainant and the other parties to the suit was under advisement by the Court and still undecided, two more petitions in intervention were filed.

The first of these petitions was by one John C. Thompson, filed December 11, 1896, praying for specific performance of a contract with the defendant Woodbridge Company evidenced by certain scrip that had been issued to assignors of the petitioner for permanent water rights; or in the alternative for a preference on account of the claims by reason of which said scrip had been issued. Said petition was demurred to by this complainant and by the interveners P. A. Buell and Company and others, and the issues thus raised were argued in January, 1897. Upon the argument the petitioner was allowed time to amend his petition, which he thereupon did by amendments made on or about February 2, 1897. On or about February 18, 1897, the demurrer of this complainant and all said interveners to the amended petition of said Thompson was argued and submitted. On or about March 15, 1897, the demurrer was sustained, as appears by the opinion reported at 79 Federal Reporter, 501, to which report complainant begs leave to refer; and further time was allowed to said Thompson to amend the petition. The petition having been thereafter amended, demurrer and answer were filed thereto. The case was thereafter argued and the

demurrers sustained by the Court, as appears by the opinion
270 on final decree as reported at 86 Federal Reporter, 975.

On or about February 24, 1897, a petition in intervention was filed by one F. C. McClelland, which petition was thereafter demurred to and subsequently a stipulation of facts was entered into in relation to this case. Said petition was sustained by said opinion on final decree as reported as 86 Federal Reporter, 975.

Finally, on or about June 25, 1897, a petition was filed by one J. N. Castle, praying for specific performance of a contract for conveyance of water rights. The question raised by said petition was sustained by said opinion on final decree as reported at 86 Federal Reporter, 975.

Examination of the clerk's docket will show that the delays in this case, which resulted in the lapse of nearly three years between the filing of the original bill of complaint and the entry of the final decree were almost entirely due to the interposition of these various bills of complaint and the petitions in intervention and that these delays thus caused without fault on the part of this complainant caused the expenses of the receivership, which expenses could have been avoided only by an order of the court directing the immediate sale of the property in the hands of the receiver and depositing the proceeds of said sale to await the final decree in the suit—a measure whose advisability did not suggest itself to anybody until after the disastrous flood of July, 1896, hereinafter mentioned, and which
then, when a motion to that effect was made by the receiver,
271 seemed unnecessary in view of the fact that a very early termination of the suit by a final decree was expected.

So far as the unfortunate result of the receivership was not due to unforeseen disasters caused by the elements and by unknown defects in the construction of the main dam, and so far as they could have been discerned by human foresight, the main responsibility must rest with this petitioner, the receiver appointed by the Court, who was in possession of the property, was personally familiar with its care and management and was privileged to receive the constant advice of the Court.

The order appointing said petitioner receiver, to which order this complainant begs to refer, provided that he should, as soon as possible, make and file an inventory of the property of the defendant Woodbridge company; should continue the operation of the works of said company; and should keep full accounts, holding all moneys in his hands subject to the order of the Court. Within three months after his appointment and on or about December 29, 1894, the receiver filed his first report verified December 26. It appears therefrom that on October 4, 1894, the day after his appointment, he visited the works of the defendant Woodbridge company, and that he was there placed in charge and possession of the same by the superintendent; that he took charge thereof through a bookkeeper who was employed for over a month by him and rendered to him statements of the affairs of the company; and that thereafter he remained in charge through the superintendent, employing also other

agents and workmen. He was well aware of the narrow cir-
272 cumstances of the company, his reports showing that it had only $82.30 cash to its credit and that all of the cash which he received up to the day of the report was $875.75, which was less by $27.93 than the amount expended by him during said period. This complainant begs to refer especially to Exhibit "A" annexed to said report, being the final balance of the company as found by its bookkeeper. In said report said receiver petitioned for leave to issue receiver's certificates, and his petition was in part granted by order of January 23, 1895. It permitted the issuance of certificates bearing interest at the rate of not over 8% per annum.

On or about January 31, 1895, the second report of the receiver was filed, bearing date January 30, 1895, to which report this complainant begs to refer. It states that he has been unable to raise the money authorized by the order; that he was then actually indebted in the sum of $1,700 for work and labor; that there were outstanding about $20,000 of time certificates given by the defendant Woodbridge company for work, labor and material furnished prior to his appointment; that the men threatened to leave work, in which case the receiver would be entirely unable to manage and care for the said property to protect it from damage or loss, or to preserve the title of the water rights; that no further money had come into his hands as receiver and that there was nothing outstanding upon which he could make collections, everything available having been hypothe-
273 cated before his appointment; and that he knew of no source of income available prior to the next June or July.

Upon this report this complainant consenting and the defendant not objecting, the receiver was authorized to borrow the sum prayed by him, namely: $5,000 upon receiver's certificates bearing interest at not over 10% per annum.

The next report of the receiver, to which also this complainant begs to refer, is dated August 13, 1896, and was filed on or about said date. It appears by said report that on July 23, 1895, without any warning or means of prevention, the river undermined the easterly portion of a large wooden dam of the company, located at Woodbridge, and carried away its east abutment, causing the river to change its channel and flow over the ground formerly occupied by said abutment, carrying away 10,000 cubic yards of earth which formerly constituted the easterly bank of the river, washing out the sheet piling in front of the dam for a distance of 120 feet, and displacing many of the heavy timbers supporting the large wooden front apron. It further appears from said report that he had been unable to raise money on the receiver's certificates authorized as aforesaid without personally guaranteeing the amount of same (which he does not claim to have done); that, however, he obtained money for repairs on the dam from the principal patrons of the company on condition that he should give them receiver's receipts for said money and employ an engineer named by them, the afore-
said Pidge; that under his direction and at an additional ex-
274 pense of about $5,000, the dam was finally repaired; but that on July 26, 1896, it was again undermined at the same place.

It further appears that from the time of the first repairs, on or about November, 1895, the engineer in charge thought that it would be impossible for the river to undermine the dam again, as he claimed that the sheet piling was driven far down into a bed of blue clay, which was supposed to form the bed of the river; but that his opinion was incorrect, and that the general opinion of civil engineers that there was a well defined bed of clay in the bed of the river at the place where the dam was constructed was wholly or partly unfounded, so that it would be necessary thereafter to make repairs on the theory that there was no bed of blue clay under the river. It further appears from said report that immediate repairs were necessary; that no further funds could be raised on the receiver's certificates; that the property, if offered for sale, would not in the receiver's judgment in its present condition bring anything near its worth, although it would be likely to depreciate in value if left in its present condition, and that the water of the river had not gone down sufficiently as yet to enable the men to estimate upon the necessary repairs.

Upon said report the petitioner through his counsel moved for leave to sell the property, pay the expenses out of the proceeds and bring the balance of the proceeds into court to await the final determination of the Court. Said application was originally noticed for August 24, 1896, and adjourned from time to time until
275 November 19, 1896, when an order was entered upon consent of this complainant authorizing an issue of receiver's certificates to the amount of $2,500 bearing interest at a rate not exceeding ten per cent. per annum. At this time the amended bill of complaint had been taken *pro confesso*. The facts in relation to the Buell intervention had been stipulated and that case was about to be submitted to the Court, while the decision of the Court upon the other pending interventions was immediately expected, the intervention proceedings of Messrs. Thompson and McClelland not having been commenced. On or about August 10, 1897, a further report of the receiver verified June 17, 1897, was filed, to which report also this complainant begs leave to refer. It appears therefrom that upon taking charge as receiver he had made a full and careful examination of all the properties and ascertained the condition thereof and that the report which had been filed by him on December 26, 1894, is a full and complete statement of the result of his investigations. As said report contained no statement or hint of the dangerous condition of the dam, which at a later date caused the disastrous result of the receivership, it is properly inferable that this result was not due in any way to this complainant, who was obliged to rely and did rely upon the receiver for information as to the condition of the property, but as above stated is chargeable (if to anybody) to the receiver himself, for insufficient investigation. In said report it appears that under the order of February 15, 1895, receiver's certificates to the amount of nearly $5,000 (the
276 amount allowed in said order as aforesaid) were issued at various dates, commencing April 2, 1895, and prior to January 31, 1896. It further appears from Exhibit "B" annexed to said

report, to which complainant begs to refer, that a large amount of certificates apparently unauthorized by any order of the court were issued on January 31st, and at various dates in February, 1896, and that the $2,500 in certificates authorized by the order of November 9, 1896, were issued on November 27th. It further appears by said report that the receiver's certificates issued without prior authority from the Court aforesaid, together with a portion of those issued under the pretended authority of February 15, 1895, were actually issued not for cash but for labor performed by the farmers in the vicinity. It further appears from this report that prior to making the repairs to the dam in the fall of 1895, said petitioner, the receiver, had learned that for a long time before his appointment the dam had been a subject of almost constant repair and expense to the company, due to the formation of the river generally causing destructive accumulations of drift producing great and unnecessary pressure upon the dam which during said repairs the petitioner relieved; so that the subsequent misfortune of July 26, 1896, was due to other and different causes growing out of the defective causes in the original risk; and that the reason why no definite action was taken under his report of this disaster was that he anticipated an early and final decree in the court. It further appears from this report that
277 the total amount of cash ever received by the petitioner growing out of receiver's certificates was $4,350, although the total amount of certificates issued was $10,265.15, although the receiver was not authorized to issue receiver's certificates except for cash, and their issuance for any other consideration was illegal.

Seventh.

And further answering said petition this complainant shows to the Court, that as appears from the record of this suit the final decree of foreclosure and sale herein was duly entered September 18, 1897; that after finding the various allowances to be made to the receiver and his counsel and to holders of receiver's certificates and time checks and to laborers and materialmen and to solicitors for the complainant and certain interveners in the case, and after fixing the amount due and applicable upon the various bonds secured by the mortgage, and after containing the usual provisions for a sale of the property, payment of preferred claims out of the proceeds of said sale and payment of balance of said proceeds, if any, into court, and due report of sale, and after providing for the recovery of costs by complainant from certain interveners, the decree closes with the following clause, which is the only clause reserving any questions for the future determination of the Court, to wit: "This decree is given and made subject to modification by the Court at any time before final confirmation of sale, as to the upset or minimum price at which said sale may be made, and also as to the manner of sale
278 of personal property or choses in action or securities thereunder; and subject to the right of the court at any time before the sale to authorize the withdrawal of choses in action and securities from sale and the settlement, compromise and cancellation thereof."

And in particular said decree contains no provision or reservation permitting the Court thereafter to enter a personal judgment against this complainant for any part of the compensation or expenses of the receiver or his counsel, past or future, or for any part of the receiver's certificates or time checks, or for any of the persons performing work or furnishing material, past or future, for said receiver, and this complainant avers and submits to the Court that the Court has no jurisdiction as long as said decree remains unopened to enter any order or decree *in personam* against this complainant directing it to pay any part of the fees, expenses, certificates, time checks or other obligations aforesaid.

Eighth.

And this complainant further shows that by reason of the final decree of foreclosure and sale herein entered September 18, 1897, it is adjudicated as between the petitioner, the receiver, and this complainant and all other persons interested, that the aforesaid fees, expenses, certificates, time checks or other obligations are not personally chargeable against this complainant, but collectible only out of the property under foreclosure.

Ninth.

279 And this complainant further shows that the holders of the receiver's certificates and time checks and the persons who have done work and furnished material to said receiver, as this complainant is informed and believes, have not been cited as parties to the proceeding instituted by said petition of the receiver and would therefore not be bound by any order or decree entered upon said petition, and that the receiver is not interested in their claims and has no equity based upon them, and that for this reason and because the rights of all of said persons were foreclosed and adjudicated by said decree of September 18, 1897, as aforesaid, and no further jurisdiction in the matter was reserved, this Court is without jurisdiction to enter any decree or order directing any portion of their claims to be paid by this complainant in this proceeding.

Tenth.

And this complainant further shows that it is without knowledge or information as to the names of the present owners and holders of any of said certificates, time checks or claims for labor done or materials furnished for the receiver, but that it avers and submits to the Court that said persons and all of them are necessary parties to this proceeding, and in their absence no relief can be given as to any of their claims, and the petitioner, said receiver, has no interest therein (except so far as he may be assignee of any of them, as to which this complainant has no knowledge or information), and the Court is without jurisdiction to grant any such relief.

280 Eleventh.

And this complainant further shows that it is a corporation enjoying very high credit in the commercial community all over the United States, and that, had it been stated or believed by the persons taking said receiver's certificates, or any of them, that this complainant was personally liable upon them, either primarily or secondarily, they would have been rapidly subscribed to at a low rate of interest instead of being put out with great difficulty at an interest of ten per cent. per annum, and that by their own terms they are a liability of the property only; and that it would be grossly inequitable to this complainant to permit a personal recovery against it under these circumstances, and as this complainant is informed and believes that said certificates, time checks and other claims, or a great part thereof, have since the decree been sold at great discount and are now held by persons other than the original holders, and it would be inequitable, if any recovery was allowed upon them, to allow the recovery of more than the sums paid therefor by the present owners, with legal interest.

Twelfth.

And this complainant further shows that neither the receiver nor his counsel nor any of the holders of said certificates, time checks or claims gave notice to this complainant of any claim of personal liability on the part of the complainant for any of the matters set forth in this petition until the filing thereof, nor has any per-
281 son up to this date given such notice except the receiver and his counsel; and that by reason of such silence on their part this complainant permitted said claims to be adjudicated by said decree of September 18, 1897, without the opposition which would have been made had any claim of personal liability been raised, and in particular permitted the illegal and unauthorized receiver's certificates hereinbefore described to be confirmed by said decree and took no appeal from the decree in that regard; and that this petitioner, the receiver, as this complainant is informed and believes, applied for no order to show cause upon the claims presented in his petition until November 18, 1899, after the time to appeal from said decree had elapsed and after the time to redeem the property from the sale under said decree (upon which sale said property was purchased for the benefit of said receiver and his counsel) had also elapsed, and this complainant avers and submits to this Court that the claims presented against it by said petition of the receiver are barred by his laches and inequitable conduct in the premises.

Thirteenth.

And this complainant further shows that it has had no beneficial interest in the subject of this suit, but has acted merely as trustee for the bondholders and that it is inequitable to subject it to any of the expenses incurred by the receiver in the suit, and that the persons, if any, who could properly be subjected to contribution for any of such expenses are the holders of the various bonds secured by the

mortgage foreclosed herein and for whose benefit this suit was
282 commenced, including the intervening bondholders. The names of said owners and holders, as this complainant is informed and believes, being as follows: P. A. Buell & Co., Eaton, Newell & Buckley, Louis Epstein & Co., Fresno National Bank, Stockton Lumber Company, Kutner, Goldstein & Co., Bank of Central California, J. J. Swain, H. Bently, Francis Cogswell, Stanley W. Dexter. And this complainant avers and submits to this Court that all of said bondholders should be cited and made parties to the hearing upon this petition, and that there is a defect of parties because they are not before the Court.

Fourteenth.

For further answer and objection to the said report and petition this complainant shows that it is a corporation organized under the laws of New York for the purpose of accepting and executing all lawful trusts, and as such, accepted from the corporate defendant a deed of all its canal system and its property, in trust, nevertheless, for the use and benefit of any and all persons or corporations who should thereafter at any time become the purchasers, holders or owners of any of said bonds, subject to the possession and management of said canal system and property by said company so long as no default should be made in the payment of said bonds.

And this complainant avers that at all times in the exercise of the powers conferred upon it by said deed of trust and in the conduct of this suit and in the employ of attorneys and agents, it has acted in
good faith in regard thereto and without any negligence, de-
283 fault or misconduct upon its part, and that each and every act has been done and performed by it, in pursuance of the discretionary powers conferred upon it by said deed of trust, and in the course of the execution of its said trust and that it has well and faithfully performed its said trust and has not failed in the execution of any of its duties under said trust.

And this complainant further avers under the terms of said deed of trust and the law and practice of this court, it incurred no personal liability in exercising or declining to exercise its discretionary powers—except to the extent of the funds or property held by it as trustee for the use and benefit of the bondholders—and that such property has been sold by this court under the final judgment herein and no fund or proceeds have come into the possession of this complainant as trustee, and this complainant has no funds or property in its possession applicable to the payment of the costs and expenses set forth in the receiver's final report and petition.

Wherefore this complainant submits to this Honorable Court that all and every of the matters in the said final report and petition of the receiver are matters with respect to which the said receiver is not entitled to any relief from a court of equity, and this complainant hopes that it shall have the same benefit of this defense as if it had demurred to the said petition and report; and this complainant denies all and all manner of fraud, collusion, unlawful combination and confederacy wherewith he is by the said report and petition charged,

without this, that there is any other matter, cause or thing
284 in said petition and report contained, material or necessary for this complainant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided, or denied, is true to the knowledge and belief of this complainant; all which matters and things this complainant is hereby ready and willing to aver, maintain, and prove, as this Honorable Court shall direct; and humbly prays to be hence dismissed with its reasonable costs and charges, in this behalf most wrongfully sustained.

[SEAL.] ATLANTIC TRUST CO.,
By BENJAMIN STRONG, JR., *Secretary.*
J. J. SCRIVNER,
Solicitor for Complainant.

J. J. SCRIVNER,
Of Counsel for Complainant.

SOUTHERN DISTRICT OF NEW YORK,
State of New York, City and County of New York, ss:

Benjamin Strong, Jr., being duly sworn, says that he resides in Englewood, New Jersey, and is the secretary of the Atlantic Trust Company, the complainant herein; that he has read the fore-
285 going answer and knows the contents thereof and that the same is true of his own knowledge, except so far as the same are stated to be on information and belief, and as to those matters he believes it to be true. Deponent further says that the reason why this verification is not made by complainant is that it is a corporation; that deponent is an officer of the same, to wit, secretary thereof.

BENJAMIN STRONG, JR.

Sworn to before me this 8th day of April, 1903.

[SEAL.] STANLEY W. DEXTER,
Notary Public, New York County.

[Endorsed:] Received a Copy of the within Answer, this 14th day of April, 1903. Fox & Gray Attorneys for Receiver. Filed April 14th 1903. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

286 In the Circuit Court of the United States, for the Ninth Judicial Circuit, in and for the Northern District of California.

No. 11950.

THE ATLANTIC TRUST COMPANY, Complainant,
vs.
WOODBRIDGE CANAL AND IRRIGATION CO. ET AL., etc., Defendants.

Notice of Motion to Strike from Files Receiver's Motion to Strike Out Complainant's Answer, etc.

To the Above-named Defendant and E. C. Chapman, Receiver, and to Fox & Gray, Attorneys for said Receiver:

You will please take notice, that on Monday, the twelfth day of October, 1903, at ten o'clock A. M. of that day or as soon thereafter as counsel can be heard, at the courtroom of said court in the Appraisers' Building, in the city and county of San Francisco, State of California, the said complainant will move the said Court to strike from the files of said court, the motion and notice of motion to strike out the answer of said complainant to the petition or complaint of said receiver, which said notice and motion was made and filed herein on the twenty-seventh day of April, 1903, upon the grounds, to wit:

1. That the motion to strike out an answer is unknown to the equity practice of this court and the court is without jurisdic-
287 tion to grant a motion striking out the answer in this cause.

2. That the sufficiency of an answer cannot be tested upon a motion to strike out, or demurrer, or in any other manner except to have the cause set down for hearing upon complaint and answer, or by exceptions thereto filed according to the equity rules of this court. Said motion will be made upon the petition or complaint of said E. C. Chapman, filed herein and upon the said answer and the said motion and notice of motion to strike out said answer. And said complainant asks that said cause be now heard as upon bill and answer, or that said receiver as complainant herein be now required to file his replication to said answer, and that the cause thereafter proved according to the equity rules and practice of this Court.

Dated October 7th, 1903.

J. J. SCRIVNER,
Solicitor for Complainant.

[Endorsed:] Received a Copy of the within Notice this 7th day of October, 1903. Fox & Gray, Att'ys for Receiver. Filed October 7th, 1903. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

288 At a stated term, to wit, the November Term, A. D. 1903, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the court room in the city and county of San Francisco, on Monday, the 16th day of November, in the year of our Lord one thousand nine hundred and three.

Present: The Honorable William W. Morrow, Circuit Judge.

No. 11950.

THE ATLANTIC TRUST COMPANY
vs.
WOODBRIDGE CANAL AND IRRIGATION CO.

Order Denying Receiver's Motion to Strike Out Answer and Complainant's Motion to Strike Out Receiver's said Motion, etc.

The receiver's motion to strike out the answer of complainant to final report and petition of receiver, and complainant's motion to strike out said motion of receiver herein, came on this day to be heard and having been argued by the solicitors for the respective parties, and considered by the Court, it is ordered that said motions and each of them be and hereby is denied. It is further ordered that the solicitor for receiver have ten days from this date within which to file replication to said answer of complainant to receiver's petition, move for decree upon pleadings, or for an order of reference to the master.

289 At a stated term, to wit, the November Term, A. D. 1903, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the city and county of San Francisco, on Monday, the 23d day of November, in the year of our Lord one thousand nine hundred and three.

Present: The Honorable William W. Morrow, Circuit Judge.

No. 11950.

ATLANTIC TRUST CO.
vs.
WOODBRIDGE CANAL AND IRRIGATION COMPANY.

Order of Court Submitting Receiver's Petition on Petition and Answer and Briefs to be Filed.

By consent it is ordered that the receiver's *ex parte* motion to submit this cause on the issues joined by the final report and petition of receiver, and complainant's answer thereto, be and is granted; the receiver's solicitor waiving replication to complainant's answer, and complainant's solicitor consenting that this submission be

as upon bill and answer, and that this submission be upon the printed briefs now presented and filed by receiver's solicitor, and brief to be filed by complainant within 20 days, and by receiver in reply within 5 days thereafter.

290 In the Circuit Court of the United States, Ninth Circuit in and for the Northern District of California.

No. 11950.

THE ATLANTIC TRUST COMPANY, Complainant,
vs.
WOODBRIDGE CANAL AND IRRIGATION COMPANY, Defendant.

Judgment and Decree.

In Proceedings Supplementary to Decree of Foreclosure and Decree of Confirmation of Sale under said Foreclosure, had on Final Report and Petition of E. C. Chapman, Esq., Receiver in said Cause, Praying for Settlement of his Final Account, and for the Ascertainment and Determination of the Amount of the Unpaid Balance on Account of Moneys Advanced by said Receiver and on Receiver's Certificates Issued by him as such Under the Order of this Court and Consented to by the Plaintiff in this Cause, and on Time Checks Issued by Him for Work and Labor Done, and for Materials Furnished and Board of Men, etc., all of Which was Allowed and Ordered Paid by this Court in and by the Original Decree of Foreclosure Entered Herein on the 18th day of September, 1897; and also for the Ascertainment and Settlement of the Further Amount due to said Receiver on Account of Further Advances Made by him, and Further Expenses and Liabili-
291 ties Incurred for Work and Labor Performed for him after the said Decree of Foreclosure, and While the Mortgaged Property Still Remained in his Charge and Under his Care as Such Receiver; and Praying that Judgment be Given and Made and Entered Herein, Against the Atlantic Trust Company, the Plaintiff in This Cause, at whose Instance and on Whose Motion the Said Receiver was Appointed and Expenses Incurred, for the Full Amount of the Balance so Ascertained and Determined to be Due and Unpaid, the Same to be Paid into Court and Distributed to the Several Parties or Persons Entitled Thereto as the Court Should Direct.

This cause having heretofore been heard upon the supplementary proceedings above mentioned, upon the report and petition of the said E. C. Chapman, receiver, and the demurrer of plaintiff thereto, and this Court having on the 11th day of March, 1901, sustained such demurrer and denied the prayer and application of said petitioner, on the ground that the Court had no jurisdiction to grant the relief prayed, from which decision and judgment of the Court an

appeal was in due course taken to the Circuit Court of Appeals in and for the Ninth Judicial Circuit, and in that court having been in due course argued and submitted, and the said Circuit Court of Appeals having subsequently reversed the decision and judgment of this Court thereon, and held and decided "that the complainant is liable for the deficiency shown by the decrees already ren-
292 dered in the cause, and for such further deficiency as may be properly ascertained," and "that upon the settlement of the receiver's account, and the proper ascertainment of such further deficiency, if any, judgment may be entered against the complainant for the aggregate amount thereof: jurisdiction over the cause and of all of the parties having been retained by the Court for that purpose," and having directed that the order of this Court from which the appeal was taken, to wit, the order dismissing the application of the receiver, be "reversed and the cause remanded for further proceedings not inconsistent with this opinion;" and the mandate of said Court of Appeals having been duly and regularly filed in this court; and thereupon the said complainant having made and filed its answer to the report, application and petition of said receiver, and the same having been duly presented, argued and submitted on the report and petition of said receiver, the answer of the complainant thereto, the mandate of the said Circuit Court of Appeals, the records and files of this court in the cause as to all matters pertaining to the question of the amount of and the liability of the Atlantic Trust Company for the deficiency on account of advances made by the receiver, receiver's certificates, and other items of expenses and liabilities which had been ascertained and settled in and by the original decree of foreclosure, and on admissions made in open court and agreed upon in open court as advances made and liabilities incurred by said receiver subsequent to the date of said decree of foreclosure and while the mortgaged property still
293 remained in the charge and care of said receiver, the receiver and his counsel waiving all claim for or on account of services rendered by them or either of them subsequent to said decree. And the Court having duly considered the same it is by the Court now here determined, adjudged and decreed:

(1) That there was, on the 15th day of August, 1898, after the application of the balance remaining in the hands of the clerk of this court out of the proceeds of the sale on that day confirmed by the Court toward the payment of accrued interest, a deficiency on account of receiver's certificates theretofore issued by said receiver in this cause, the principal and accrued interest upon which amounted to the sum of $12,292.47, to which now, according to the terms and conditions of said certificates and the decree of foreclosure entered in this cause on the 18th day of September, 1897, to be added interest on the aggregate of the principal sums named in said certificates, to wit, $10,265.15, at the rate of ten per cent. per annum, from said 15th day of August, 1898, to the date of this decree amounting to $6,074.72, making the aggregate of the deficiency on account of said

receiver's certificates, now remaining due and unpaid the sum of $18,367.19.

(2) That there is also a deficiency, now remaining due and unpaid, on other items allowed and ordered paid in and by the said original decree of foreclosure, the following additional sums, to wit:

To E. C. Chapman, receiver, on account of advances made by him in the care and management of the mortgaged property, the
294 sum of $3,105.72, together with interest thereon from the date of said decree of foreclosure to the date hereof, at the rate of seven per cent. per annum, amounting to $1,419.18, making a total of $4,524.90.

On time checks issued for work and labor, held by divers persons, and allowed in and by the said decree of foreclosure, amounting to the sum of $5,728.89, together with interest thereon from the date of said decree to this date at the rate of seven per cent. per annum, amounting to $2,699.66, aggregating the sum of $8,348.85.

To divers persons for work and labor done, material furnished, and for board of men employed on said work, allowed and ordered paid in and by the said decree of foreclosure, the aggregate sum of $2,269.85, together with interest thereon from the date of said decree to this date, at the rate of seven per cent. per annum, amounting to the sum of $1,039.30 aggregating the sum of $3,309.15.

Making a total amount of the aggregate sum now due and unpaid, of deficiency for and on account of the claims allowed and ordered paid in and by the said original decree of foreclosure, on account of advances made by, and expenses incurred by such receiver, $34,-550.09.

(3) And upon this the final settlement of the accounts of said receiver, it is further ordered, adjudged and decreed that there be allowed to said E. C. Chapman, receiver, for advances made
295 by him in the care and management of the mortgaged property after the decree of foreclosure, and while the same remained in his charge and care, $529.40; F. G. McClelland for services, work and labor, same time, $128.00; J. J. Hinckley, for services rendered during same time, $900.00, making a total deficiency, on the accounts of said receiver, as now and heretofore settled and allowed, $36,207.57.

For all of which, under the law and the facts in this case the plaintiff and complainant herein, the Atlantic Trust Company is liable.

And it is further ordered, adjudged and decreed, that judgment be and the same is hereby given, made and entered, in favor of said E. C. Chapman, receiver in this cause, against the complainant in this cause, The AtAlantic Trust Company, for the said sum of thirty-this cause, The Atlantic Trust Company, for the said sum of thirty-six thousand two hundred and seven 57/100 dollars, $36,207.57, with interest thereon from this date until paid, at the rate of seven per cent. per annum, together with his costs in this supplementary proceeding, taxed at the sum of $ ——, the same to be paid by said complainant into court within 120 days from the date hereof, in lawful money of the United States, and if not so paid then the receiver, said E. C. Chapman, to have execution therefor, for the full

amount of said judgment and costs with interest on the principal sum as above provided, and upon collection thereof the amount so collected to be paid into court, and the clerk of said court to distribute and pay the same over to the several parties entitled thereto,
as shown by the decree of foreclosure entered herein, and by
296 the allowances now herein made upon settlement of final
account, or to their assignees, and upon such payment or collection and payment into court that the said E. C. Chapman be finally discharged as such receiver.

Dated this 30th day of March, 1904.

WM. W. MORROW, *Judge.*

[Endorsed:] Filed and entered March 30, 1904. Southard Hoffman, Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THE ATLANTIC TRUST COMPANY, Complainant,
vs.
WOODBRIDGE CANAL AND IRRIGATION COMPANY ET AL., ETC., Respondents.

Stipulation as to Motion to Amend Decree, etc.

It is hereby stipulated and agreed that the motion to amend the decree of March 30th, 1904, made by complainant in the above-entitled cause, and noticed to be heard on the fifth day of July, 1904, be deemed to be, and the same is hereby submitted to the Court for its judgment and decision, and without argument unless argument is
ordered by the Court or judge thereof; said motion to be heard
297 at the next sitting of the Court, or as soon thereafter as counsel can be heard.

It is further stipulated that if the Judge shall grant the motion amending said decree or any portion thereof, that the same as so amended may be engrossed and filed *nunc pro tunc* as of March 30th, 1904.

Dated July 9th, 1904.

J. J. SCRIVNER,
Solicitor for Complainant.
R. S. GRAY,
Surviving Partner of the Firm of Fox & Gray, Solicitor for Respondent and E. C. Chapman, Receiver.

In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California.

No. 11950.

THE ATLANTIC TRUST COMPANY, Complainant,
vs.
WOODBRIDGE CANAL AND IRRIGATION COMPANY, Defendant.

Amended Judgment and Decree.

In proceedings supplementary to decree of foreclosure and decree of confirmation of sale under said foreclosure, had on final report and petition of E. C. Chapman, Esq., receiver in said cause, praying for settlement of his final account, and for the ascertainment and determination of the amount of the unpaid balance on account of
298 moneys advanced by said receiver and on receiver's certificates issued by him as such under the order of this Court and consented to by the plaintiff in this cause, and on time checks issued by him for work and labor done, and for materials furnished and board of men, etc., all of which was allowed and ordered paid by this Court in and by the original decree of foreclosure entered herein on the 18th day of September, 1897, and also for the ascertainment and settlement of the further amount due to said receiver on account of further expenses and liabilities incurred for work and labor performed for him after the said decree of foreclosure, and while the mortgaged property still remained in his charge and under his care as such receiver; and praying that judgment be given and made and entered herein, against the Atlantic Trust Company, the plaintiff in this cause, at whose instance and on whose motion the said receiver was appointed and expenses incurred, for the full amount of the balance so ascertained and determined to be due and unpaid, the same to be paid into court and distributed to the several parties or persons entitled thereto as the Court should direct.

This cause having heretofore been heard upon the supplementary proceeding above mentioned, upon the report and petition of the said E. C. Chapman, receiver, and the demurrer of plaintiff thereto, and this Court having on the 11th day of March 1901, sustained such demurrer and denied the prayer and application of said
299 petitioner, on the ground that the Court had no jurisdiction to grant the relief prayed, from which decision and judgment of the Court an appeal was in due course taken to the Circuit Court of Appeals in and for the Ninth Judicial Circuit, and in the Court having been in due course argued and submitted, and the said Circuit Court of Appeals having subsequently reversed the decision and judgment of this Court thereon, and held and decided "that the complainant is liable for the deficiency shown by the decree already rendered in the cause and for such further deficiency as may be properly ascertained," and "that upon the settlement of the receiver's account, and the proper ascertainment of such further deficiency, if

any, judgment may be rendered against the complainant for the aggregate amount thereof; jurisdiction over the cause and of all of the parties retained by the Court for that purpose," and having directed that the order of this Court from which the appeal was taken, to wit, the order dismissing the application of the receiver, be "reversed and the cause remanded for further proceedings not inconsistent with this opinion," and the mandate of said Court of Appeals having been duly and regularly filed its answer to the report, application and petition of said receiver, and the said receiver having set the cause down for a final hearing upon said petition and answer, and the same having been duly presented, argued and submitted on the report and petition of said receiver, the answer of the
300 complainant thereto, and the mandate of the said Circuit Court of Appeals, and the court upon said hearing having taken judicial notice of the records and files of this court in the cause as to all matters pertaining to the question of the amount of and the liability of the Atlantic Trust Company for the deficiency on account of advances made by the receiver, receiver's certificates and other items of expenses and liabilities which have been ascertained and settled in and by the original decree of foreclosure, the records and files of which judicial notice was thus taken having been the following, to wit, the original and amended bills of complaint herein, the order appointing said receiver, the receiver's reports (excluding the exhibits thereto annexed except as hereinafter recited) of December 29, 1894 (and Exhibit "A" annexed to said report), January 31, 1895, and August 13, 1896, and the orders for issuance of receiver's certificates granted upon said reports respectively, the petition of intervention of P. A. Buell & Company and others, of March 25, 1896, the order allowing said intervention of June 12, 1896, the order allowing the bonds of said interveners of April 5, 1897, the receiver's report of August 10, 1897, and Exhibit "D" thereto annexed, the clerk's docket of the proceedings herein prior to the final decree of foreclosure, on September 18, 1897, said decree, and the decree confirming the same on August 15, 1898; and on admissions made in open court and agreed upon in open court as advance- made and liabilities incurred by said receiver subsequent to the date
301 of said decree of foreclosure and while the mortgaged property still remained i.. ..e charge and care of said receiver, said admissions being that the following items of expenditures and indebtedness contracted and owing by the receiver subsequent to the date of his last report as appears in his final report and petition herein, were and are correct, to wit:

2 men employed for taking care of the property for 12 months	$900.00
Balance due F. C. McClelland for services	128.00
Balance due on account of personal expenses as called for in said petition	529.40
Balance due J. J. Hinckley for services	900.00
Total	$2457.40

—all of which appears in said report.

And the receiver and his counsel, Charles N. Fox, waiving any claim for further or additional compensation for services rendered subsequent to the final decree in the cause, and the Court having duly considered the same it is by the Court now here determined, adjudged and decreed:

(1) That there was, on the 15th day of August, 1898, after the application of the balance remaining in the hands of the clerk of this court out of the proceeds of the sale on that day confirmed by the Court towards the payment of accrued interest, a deficiency on account of receiver's certificates theretofore *is* issued by said receiver in this cause, the principal and accrued interest upon which
302 amounted to the sum of $12,292.47, to which is now, according to the terms and conditions of said certificates and the decree of foreclosure entered in this cause on the 18th day of September, 1897, to be added interest on the aggregate of the principal sums named in said certificates to wit, $10,265.15, at the rate of ten per cent. per annum, from said 15th day of August, 1898, to the date of this decree amounting to $6,074.72. Making the aggregate of the deficiency on account of said receiver's certificates, now remaining due and unpaid, the sum of $18,367.19.

(2) That there is also remaining a deficiency, now remaining due and unpaid, on other items allowed, and ordered paid in and by said original decree of foreclosure the following additional sums, to wit:

To E. C. Chapman, receiver, on account of advances made by him in the care and management of the mortgaged property in the sum of $3,105.72, together with interest thereon from the date of said decree of foreclosure to the date hereof, at the rate of seven per cent. per annum amounting to $1,419.18, making a total of $4,524.90.

On time checks issued for work and labor, held by divers persons, and allowed paid in and by the said decree of foreclosure, amounting to the sum of 5,726.89, together with interest thereon from *that* date of said decree to this date at the rate of seven per cent. per annum, amounting to $2,689.66, aggregating the sum of $8,348.85.

To divers persons for work and labor done, materials furnished and for board of men employed on said work, allowed and
303 ordered paid in and by the said decree of foreclosure, the aggregate sum of $2,269.85, together with interest thereon from the date of said decree of foreclosure to this date at the rate of seven per cent. per annum, amounting to the sum of $1,039.30, aggregating the sum of $3,309.15.

Making a total amount of the aggregate sum now due and unpaid, of deficiency for and on account of the claims allowed and ordered paid in and by the original decree, of foreclosure, on account of advances made by, and expenses incurred by such receiver, $34,-550.09.

And upon this the final settlement of the accounts of said receiver it is further ordered, adjudged and decreed that there be allowed to said E. C. Chapman, Receiver, for advances made by him in the care and management of the mortgaged property after the decree of

foreclosure, and while the same remained in his charge and care, $529.40.

F. G. McClelland, for services, work and labor, same, $1,228.00; J. J. Hinckley, for services rendered during the same, $900.00; making a total deficiency, on accounts of said receiver, as now and heretofore settled and allowed, $36,207.57.

For all of which under the laws and the facts in this case the plaintiff and complainant herein, the Atlantic Trust Company, is liable.

And it is further ordered, adjudged and decreed that judgment be, and the same is hereby, given, made and entered, in favor of said E. C. Chapman, receiver in this cause, against the complain-
304 ant in this cause, The Atlantic Trust Company, for the said sum of thirty-six thousand two hundred and seven 57/100 ($36,207.57), with interest thereon from this date until paid at the rate of seven per cent. per annum together with his costs in this supplementary decree proceeding taxed at the sum of $173.55, the same to be paid by said complainant into court within 120 days from the date hereof, in lawful money of the United States, and if not so paid, then the receiver, said E. C. Chapman, to have execution therefor, for the full amount of said judgment and costs with interest on the principal sum as above provided, and upon collection thereof the amount so collected to be paid into court and the clerk of said court to distribute and pay the same over to the several parties entitled thereto, as shown by the decree of foreclosure entered herein, and by the allowance now herein made upon settlement of payment or collection and payment into court that the said E. C. Chapman be finally discharged as such receiver.

Dated this 27th day of July, 1904, *nunc pro tunc* as of the date of March 30, 1904.

WM. W. MORROW, *Judge.*

[Endorsed:] Filed and entered July 27, 1904, *nunc pro tunc* as of the 30th day of March, 1904. Southard Hoffman, Clerk.

305 At a stated term, to wit, the July Term, A. D. 1904, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the city and county of San Francisco, on Wednesday, the 27th day of July, in the year of our Lord one thousand nine hundred and four.

Present: The Honorable William W. Morrow, Circuit Judge.

No. 11950.

THE ATLANTIC TRUST COMPANY, Complainant,

vs.

WOODBRIDGE CANAL AND IRRIGATION COMPANY, Defendant.

Order Amending Decree Nunc Pro Tunc.

On the application of the above-named complainant, The Atlantic Trust Company, E. C. Chapman, Esq., the receiver of the above-

named defendant herein, appearing and not opposing the same, it is hereby

Ordered and decreed that the decree entered heretofore and at the present term and bearing date the 30th day of March, 1904, be and the same hereby is amended *nunc pro tunc* as of said date.

By inserting after the words "its answer to the report, application and petition of said receiver," the words, "and the said receiver having set the cause down for final hearing upon said petition and answer;" and

306 By inserting before the words "the records and files of this Court in the cause as to all matters pertaining to the question of the amount of and the liability of The Atlantic Trust Company," the words "and the Court upon said hearing having taken judicial notice of;" and

By inserting after the words "which have been ascertained and settled in and by the original decree of foreclosure," the words "the records and files of which judicial notice was thus taken having been the following, to wit, the original and amended bills of complaint herein, the order appointing said receiver, the receiver's reports excluding the exhibits thereto annexed except as hereinafter recited) of December 29, 1894 (and Exhibit "A" annexed to said report), January 31, 1895, and August 13, 1896, and the orders for issuance of receiver's certificates granted upon said reports respectively, the petition of intervention of P. A. Buell & Company and others, of March 25, 1896, the order allowing said intervention, of June 12, 1896, the order allowing the bonds of said interveners of April 5, 1897, the receiver's report of August 10, 1897, and Exhibit "D," thereto annexed, the clerk's docket of the proceedings herein prior to the final decree of foreclosure, on September 18, 1897, said decree, and the decree confirming the same on August 15, 1898;" and

By inserting after the words, "and while the mortgaged property still remained in the charge and care of said receiver," the words "said admissions being that the following items of expenditures and indebtedness contracted and owing by the receiver

307 subsequent to the date of his last report as appears in his final report and petition herein, were and are correct, to wit:

2 men employed for taking care of the property, for 12 months	$900.00
Balance due on account of personal expenses as called for in said petition	529.40
Balance due F. C. McClelland for services	128.00
Balance due, J. J. Hinckley for services	900.00
Total	$2457.40

—all of which appears in said report.

And the receiver and his counsel, Charles N. Fox, waive any claim for further or additional compensation for services rendered subsequent to the final decree in the cause."

In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California.

No. 11950.

THE ATLANTIC TRUST COMPANY, Complainant,
vs.
WOODBRIDGE CANAL AND IRRIGATION COMPANY, Respondent.

Petition for Order Allowing Appeal.

Comes now the Atlantic Trust Company, the original complainant in the above-entitled cause, conceiving itself aggrieved by the final decree heretofore made and entered by this Court against
308 said company and in favor of E. C. Chapman, Esq., and having filed with the clerk an assignment of errors prays this Honorable Court to allow an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from said decree, and that a transcript of the record, papers and proceedings upon which said decree was made, duly authenticated, may be sent to said Court of Appeals.

Dated September 23d, 1904.

J. J. SCRIVNER,
Solicitor for Atlantic Trust Company, Appellant.

Allowed this September 23d, 1904.

WM. W. MORROW,
U. S. Circuit Judge.

[Endorsed:] Filed September 23, 1904. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

309 In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California.

No. 11950.

THE ATLANTIC TRUST COMPANY, Complainant,
vs.
WOODBRIDGE CANAL AND IRRIGATION COMPANY ET AL., Defendants.

In Proceedings Supplemental to Decree of Foreclosure and Decree of Confirmation of Sale Under said Foreclosure had on Final Report and Petition of Edgar C. Chapman, Receiver in said Cause.

Assignment of Errors.

And now on the 23d day of September, 1904, comes the complainant and says that in the record and proceedings in the above-entitled cause, there is manifest error in each and every one of the following particulars, to wit:

First.

(*a*) In holding that the said complainant is liable for and directing judgment in favor of Edgar C. Chapman, receiver in this cause, for the amount of the deficiency remaining unpaid on account of receiver's certificates theretofore issued by said receiver in this cause.

310 (*b*) In holding that he is liable and directing judgment for the accrued interest thereon at the rate of ten per centum per annum.

(*c*) In holding that he is liable and directing judgment for any interest on the items aforesaid after the date of the decree of foreclosure.

Second.

(*a*) In holding that the said complainant is liable for and directing judgment in favor of Edgar C. Chapman, receiver in this cause, for the amount of deficiency remaining unpaid on account of advances made by said receiver in the care and management of the mortgaged property.

(*b*) In holding that he is liable and directing judgment for interest thereon from the date of the decree of foreclosure to the date of said judgment at the rate of seven per centum per annum.

(*c*) In holding that he is liable and directing judgment for any interest on the items aforesaid after the date of the decree of foreclosure.

Third.

(*a*) In holding that the said complainant is liable for and directing judgment in favor of Edgar C. Chapman, receiver in this cause, for the amount of the deficiency remaining unpaid on account of time checks issued for work and labor, held by divers persons and allowed in and by the said decree of foreclosure.

311 (*b*) In holding that he is liable and directing judgment for interest thereon from the date of said decree of foreclosure to the date of said judgment.

(*c*) In holding that he is liable and directing judgment for any interest on the items aforesaid after the date of the decree of foreclosure.

Fourth.

(*a*) In holding that the said complainant is liable for and directing judgment in favor of Edgar C. Chapman, receiver in this cause, for the amount of the deficiency remaining unpaid to divers persons for work and labor done, materials furnished and for board of men employed on said work allowed and ordered paid by the said decree of foreclosure.

(*b*) In holding that he is liable and directing judgment for interest thereon at the rate of seven per centum per annum from the date of said decree of foreclosure to the date of said judgment.

(*c*) In holding that he is liable and directing judgment for any interest on the items aforesaid after the date of decree of foreclosure.

Fifth.

(*a*) In holding that the said complainant is liable for and directing judgment in favor of Edgar C. Chapman, receiver in this cause for the amount of deficiency remaining unpaid on account of advances made by said receiver in the care and management of
312 the mortgaged property after the decree of foreclosure, and while the same remained in his charge and care, and on account of the advances made by said receiver to F. G. McClelland for services, work and labor during the same time, and on account of the advances made by said receiver to J. J. Hinckley for services rendered during the same time.

Sixth.

In holding that the said complainant is liable for and directing judgment in favor of said Edgar C. Chapman, receiver in this cause, against the complainant for the sum of thirty-six thousand two hundred and seven and 57/100 dollars ($36,207.57), with interest thereon from the date of said judgment until paid at the rate of seven per centum per annum, together with the costs in this supplemental proceedings, taxed at the sum of one hundred seventy-three and 55/100 dollars ($173.55).

Seventh.

In not holding that the decree of foreclosure is *res adjudicata* as to the method of payment of the items therein set forth, and that the Court had no jurisdiction to make any further order, judgment or decree with reference thereto, or to make any order, judgment or decree, ordering or adjudging that the complainant pay the same or any part thereof.

Eighth.

In not holding that so long as the decree of foreclosure herein remains unopened, the Court had no jurisdiction to enter any
313 order or decree *in personam* against this complainant, directing it to pay any part of the fees, expenses, certificates, time checks or other obligations aforesaid, but that they are collectible only out of the property under foreclosure.

Ninth.

In not holding that the receiver is barred from maintaining this proceeding by his laches and inequitable conduct in the premises.

Tenth.

In not requiring the bondholders whose names are given in the 13th clause of the answer to be cited and made parties to the hearing upon the receiver's petition for judgment against this complainant.

Eleventh.

In not holding that the complainant under the terms of the deed of trust and the law and practice of this court incurred no personal liability in exercising, or declining to exercise, its discretionary powers, except to the extent of the funds and property held by it as trustee for the use and benefit of the bondholders.

Twelfth.

In not holding that the complainant was free from all manner of fraud, collusion, unlawful combination and confederacy wherewith it is by the said report and petition of the receiver charged.

Wherefore the said complainant prays that the said decree
314 of the Circuit Court of the United States, Northern District of California, be reversed and that the said Court may be directed to enter a decree in accordance with the prayer of the answer of the complainant in the above-entitled proceeding.

Dated September 23d, 1904.

J. J. SCRIVNER,
Solicitor for Complainant.

[Endorsed:] Filed September 23, 1904. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California.

No. 11950.

THE ATLANTIC TRUST COMPANY, Complainant,
vs.
WOODBRIDGE CANAL AND IRRIGATION COMPANY, Respondent.

Order Allowing an Appeal and Fixing Amount of Bond.

Upon motion of J. J. Scrivner, Esq., complainant's solicitor, and upon the filing of a petition for an order allowing an appeal, together with an assignment of errors, it is ordered that complainant be and
it hereby is allowed to prosecute an appeal from the decree
315 and judgment hereto made and entered against said complainant in the above-entitled cause, to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, and that the amount of the security to be furnished by said complainant upon such appeal, be and the same is hereby fixed at five hundred ($500.00) dollars to — approved by this Court or the Judge thereof, and that a certified transcript of the record and proceedings herein be forthwith transmitted to the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated September 23d, 1904.

WM. W. MORROW,
Circuit Judge.

[Endorsed:] Filed September 23, 1904. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

Bond on Appeal.

Know all men by these presents, that we, Atlantic Trust Company, as principal, and National Surety Company, as surety, are held and firmly bound unto Edgar C. Chapman, receiver of the Woodbridge Canal and Irrigation Company and to P. A. Buell & Company, Eaton, Newell & Buckley, Louis Epstein & Company, Fresno National Bank, Stockton Lumber Company, Kutner, Goldstein & Company, Bank of Central California, J. J. Swain, H.
316 Bentley, Francis Cogswell and Stanley W. Dexter in the full and just sum of five hundred ($500) dollars, to be paid to the said obligees, their certain attorneys, executors, administrators, successors or assigns; to which payment well and truly to be made, we bind ourselves and our successors, jointly and severally, by these presents. Sealed with our seals and dated this 23d day of September, in the year of our Lord one thousand nine hundred and four.

Whereas, lately at a Circuit Court of the United States for the Northern District of California, in a suit pending in said court, between Atlantic Trust Company, as complainant, and Woodbridge Canal and Irrigation Company, as defendant, a decree was rendered against the said Atlantic Trust Company and in favor of the said receiver, and the said Atlantic Trust Company having obtained an order allowing an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and having obtained a citation directed to the appellees above named, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in said Circuit:

Now, the condition of the above obligation is such, that if the said Atlantic Trust Company shall prosecute its appeal to effect,
317 and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of

NATIONAL SURETY COMPANY,
By ROBERT M. NUGENT,
Res. Vice-President.

[Seal of National Surety Company.]

Attest: RICHARD J. MORIARTY,
Res. Ass't Secretary.

ATLANTIC TRUST COMPANY,
BRAYTON IVES, *President.*

[Seal of Atlantic Trust Company.]

Attest: CHAS. BAUER, JR., *Secretary.*

Approved by
WM. W. MORROW,
U. S. Circuit Judge.

Affidavit, Acknowledgment and Justification of Guaranty of Surety Company.

STATE OF NEW YORK, *County of New York, ss:*

On this 23d day of September, one thousand nine hundred and four, before me personally came Robert M. Nugent, known to me to be the Res. Vice-President of the National Surety Com-
318 pany, the corporation described in and which executed the within and foregoing bond of Atlantic Trust Company as surety thereon, and who, being by me duly sworn, did depose and say that he resides in the city of New York, State of New York; that he is the Res. Vice-President of said company, and knows the corporate seal thereof; that the said National Surety Company is duly and legally incorporated under the laws of the State of New York; that said company has complied with the provisions of the act of Congress of August 13, 1894; that the seal affixed to the within bond of Atlantic Trust Company is the corporate seal of said company, and was thereto affixed by order and authority of the board of directors of said company; and that he signed his name thereto by like order and authority as Res. Vice-President of said company, and that he is acquainted with Richard J. Moriarty and knows him to be the Res. Asst. Secretary of said company; and that the signature of said Richard J. Moriarty subscribed to said bond is in the genuine handwriting of said Richard J. Moriarty, and was thereto subscribed by order and authority of said board of directors, and in the presence of said deponent; and that the assets of said company, unencumbered and liable to execution, exceed its claims, debts and liabilities, of every nature whatsoever, by more than the sum of one million dollars.

Frank L. Gilbert, of San Francisco, Cal., is our agent to acknowledge service in the Judicial District wherein this bond is given.

ROBERT M. NUGENT.

319 Sworn to, acknowledged before me, and subscribed in my presence this 23d day of September, 1904.

[NOTARIAL SEAL.] BELLE F. JAIS, No. 47,
Notary Public for the County of New York.

Certificate filed in Kings, Westchester, Richmond and Queens Counties.

[Endorsed:] Filed September 28, 1904. Southard Hoffman, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

ATLANTIC TRUST COMPANY, Appellant,
vs.
WOODBRIDGE CANAL AND IRRIGATION COMPANY, EDGAR C. CHAPMAN, Receiver, Appellee.

Præcipe for Transcript.

To the Clerk of said Court:

You are hereby directed to make up the record on appeal taken by Atlantic Trust Company from the judgment and decree made by said Court in said cause in proceedings supplementary to decree of foreclosure and sale on the 30th day of March, 1904, to the United States Circuit Court of Appeals; said record to consist of the following papers in said cause, to wit:

320 (1) Bill of complaint, filed October 3, 1894, and copy of deed of trust.

(2) Subpœna.

(3) Order appointing receiver.

(4) Supplemental order of final appointment.

(5) Receiver's report of December 29, 1894, and Exhibit "A" thereto annexed.

(6) Order for leave to issue receiver's certificates, February 23, 1895.

(7) Receiver's report of January 31, 1895.

(8) Order for leave to issue receiver's certificates, February 15, 1895.

(9) Receiver's report of August 13, 1896.

(10) Order for leave to issue receiver's certificates, November 19, 1896.

(11) Amended bill of complaint, filed December 16, 1895.

(12) Order taking amended bill *pro confesso*, Dec. 16, 1895.

(13) Petition of intervention by P. A. Buell & Company *et al.*, March 25, 1896.

(14) Order allowing intervention of P. A. Buell & Company *et al.*, June 12, 1896.

(15) Order allowing bonds. P. A. Buell & Company *et al.*, April 5, 1897.

(16) Clerk's docket down to Sept. 18, 1897.

(17) Final decree of foreclosure, September 18, 1897.

(18) Decree of confirmation, August 15, 1898.

(19) Report of Clerk, September 7, 1898.

321 (20) Receiver's report of August 10, 1897, and Exhibit "D" thereto annexed.

(21) Report and petition of receiver, August 3, 1899.

(22) Order to show cause thereon, November 18, 1899.

(23) Demurrer of complainant, December 11, 1899.

(24) Order denying receiver's application, March 11, 1901.
(25) Mandate of Circuit Court of Appeals, December, 1902.
(26) Affidavit and order extending time of complainant to file answer, March 20, 1903.
(27) Answer of complainant, April —, 1903.
(28) Motion for decree as upon bill and answer, Oct., 1903, and entry of order thereon.
(29) Judgment and decree, March 30, 1904.
(30) Amendment of same *nunc pro tunc* and stipulation of July 9, 1904; and minute order of July 27th, 1904, allowing same.
(31) Petition for order allowing appeal.
(32) Assignment of errors.
(33) Order allowing appeal.
(34) Bond for costs and approval.
(35) Citation on appeal and proof of service.

J. J. SCRIVNER,
Solicitor for Complainant and Appellant.

[Endorsed:] Filed October 4, 1904. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

322 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 11950.

ATLANTIC TRUST COMPANY, Complainant,
vs.
WOODBRIDGE CANAL AND IRRIGATION COMPANY, Defendant.

Certificate to Record on Appeal.

I, Southard Hoffman, clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, do hereby certify the foregoing pages, numbered from 1 to 276, inclusive, to be full, true and correct copies of the following papers, records and proceedings in the above-entitled cause, viz: bill of complaint and Exhibit "A"—Trust Deed—filed October 3, 1894; order appointing receiver and supplemental order of final appointment, filed October 3, 1894; report of receiver and Exhibt "A" attached thereto, filed December 29, 1894; order authorizing and directing receiver to borrow money, filed January 23, 1895; report and petition of receiver, filed January 31, 1895; order authorizing receiver to borrow money and issue receiver's certificates, filed February 15, 1895; notice of motion for order of sale and report of receiver, filed August 14, 1896; order authorizing receiver's certificates to issue, filed November 19, 1896;
323 amended bill of complaint and exhibits "A" and "B" attached thereto, filed December 16, 1895; order taking amended bill of complaint *pro confesso*, entered March 5, 1896; petition of

intervention of P. A. Buell & Co., *et al.*, filed June 12, 1896; order allowing intervention of P. A. Buell & Co., *et al.*, to be filed, entered June 12, 1896; order directing entry of decree in favor of Buell & Co., *et al.*, interveners, entered April 5, 1897; report of receiver with Exhibit "D" attached thereto, filed August 10, 1897; docket entries of clerk, to September 18, 1897; decree of foreclosure and sale, filed and entered September 18, 1897; decree of confirmation of sale, filed and entered August 15, 1898; report of clerk pursuant to decree of August 15, 1898, filed September 7, 1898; final report and petition of receiver, filed August 3, 1899; order to show cause on petition of receiver, filed November 18, 1899; demurrer of complainant to receiver's report and motion for judgment, filed December 11, 1899; order denying receiver's application for order directing complainant to pay amount due, etc., entered March 11, 1901; mandate of United States Circuit Court of Appeals for the Ninth Circuit, filed and entered April 19, 1903; affidavit for order extending time to file answer, and order extending time to file answer, filed April 2, 1903; answer of complainant to final report and petition of receiver filed April 14, 1903; notice of motion to strike from files receiver's motion to strike out complainant's answer, etc., filed October 7, 1903; order denying receiver's motion to strike out answer and complainant's motion to strike out receiver's said motion, etc., entered November 16, 1903; order of court submitting receiver's petition on
324 petition and answer and briefs to be filed, entered November 23, 1903; judgment and decree on receiver's petition, etc., filed and entered March 30, 1904; stipulation as to motion to amend decree, etc., and amended judgment and decree, filed and entered July 27, 1904, *nunc pro tunc* as of the 30th day of March, 1904; order amending decree *nunc pro tunc*, entered July 27, 1904; petition for order allowing appeal, filed September 23, 1904; assignment of errors filed September 23, 1904; order allowing an appeal and fixing amount of bond; filed September 23, 1904; bond on appeal, filed September 28, 1904, and præcipe for transcript, filed October 4, 1904, and that the same constitute the transcript of the record herein upon the appeal of the Atlantic Trust Company, complainant, from the judgment and decree, filed and entered July 27, 1904, in said Circuit Court of the United States, for the Northern District of California, *nunc pro tunc* as of March 30, 1904, in favor of Edgar C. Chapman, receiver, etc., and against the complainant above named, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $175.70, that said amount was paid by the Atlantic Trust Company, and that the original citation issued herein is hereto annexed.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, this 25th day of November, A. D. 1904.

[SEAL.] SOUTHARD HOFFMAN,
Clerk of United States Circuit Court, Ninth Judicial Circuit, Northern District of California.

325 UNITED STATES OF AMERICA,
State of California, City and County of San Francisco, Northern District of California, ss:

Wm. G. Cohen, being first duly sworn, deposes and says: That he is a white male resident of the State of California, over the age of twenty-one years, and not a party to the within-entitled cause; that on the 27th day of October, 1904, at and in the county of Fresno, State of California, affiant personally served the annexed citation in said matter upon the Fresno National Bank, a corporation, by then and there delivering to and leaving with Daniel Brown, Jr., the cashier of said Fresno National Bank, for said corporation, a true and correct copy of said citation; affiant further says that on said 27th day of October, 1904, he personally served said citation upon Louis Einstein & Co., a corporation, in said Fresno County, California, by then and there delivering to and leaving with C. H. Miller, the secretary of said last-named corporation, for said corporation, a true and correct copy of said annexed citation; that on said 27th day of October, 1904, at said county of Fresno, California, affiant served the said annexed citation on Kutner, Goldstein & Co., a corporation, by then and there delivering to and leaving with E. E. Manheim, the secretary of said Kutner, Goldstein & Co., for said corporation, a true and correct copy of said citation, and that on said 27th day of October, 1904, affiant also served the said annexed
326 citation in said matter on the Bank of Central California, a corporation, in Fresno County, California, by then and there delivering to and leaving with Louis Einstein, the President of said corporation, for said corporation, a true and correct copy of said citation.

W. G. COHEN.

Subscribed and sworn to before me, this 18th day of November, 1904.

[SEAL.] D. B. RICHARDS,
Notary Public in and for the City and County of San Francisco.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to E. C. Chapman, Receiver of the Woodbridge Canal and Irrigation Company, a Corporation; P. A. Buell & Co.; Eaton, Newell & Buckley; Louis Epstein & Co.; Fresno National Bank; Stockton Lumber Co.; Kutner, Goldstein & Co.; Bank of Central California; J. J. Swain; H. Bently; Francis Cogswell and Stanley W. Dexter, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing appeal filed

in the clerk's office of the Circuit Court of the United States,
327 for the Northern District of California, in that certain suit numbered 11,950, entitled Atlantic Trust Company, a Corporation, Complainant, *vs.* Woodbridge Canal and Irrigation Company, a Corporation, *et al.*, etc., Respondents, wherein Atlantic Trust Company, a Corporation, is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William W. Morrow, United States Circuit Judge for the Ninth Judicial Circuit, at San Francisco, this 28th day of September, A. D. 1904.

WM. W. MORROW,
United States Circuit Judge.

Return on Service of Writ.

UNITED STATES OF AMERICA, *N. District of California, ss:*

I hereby certify and return that I served the annexed citation on the therein-named E. C. Chapman, receiver of the Woodbridge Canal and Irrigation Co., a corporation, by handing to and leaving a true and correct copy thereof with said E. C. Chapman, as said receiver, personally at San Francisco, in said District, on the 11th day of October, A. D. 1904, and I further return that after due and diligent search and inquiry I was unable to find, P. A. Buell & Co.,
328 Louis Epstein & Co., Fresno National Bank, Stockton Lumber Co., Kutner Goldstein & Co., Bank of Central California, H. Bentley, Francis Cogswell, in my District.

JOHN H. SHINE,
U. S. Marshal.

Return on Service of Writ.

UNITED STATES OF AMERICA, *Northern District of California, ss:*

I hereby certify and return that I served the annexed citation on the therein-named Eaton, Newell & Buckley, and J. J. Swain, by handing to and leaving a true and correct copy thereof with each of said parties personally at Stockton, San Joaquin Co., in said District, on the 8th day of October, A. D. 1904.

JOHN H. SHINE,
U. S. Marshal.

[Endorsed:] Marshal's Docket No. 3496. No. 11,950. In the Circuit Court of the United States for the Ninth Circuit, Northern District of California. Atlantic Trust Company *vs.* Woodbridge Canal and Irrigation Company. Citation. Filed November 18, 1904. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

329 [Endorsed:] No. 1142. United States Circuit Court of Appeals for the Ninth Circuit. Atlantic Trust Company (a Corporation), Appellant, *vs.* E. C. Chapman, Receiver of the Woodbridge Canal and Irrigation Company (a Corporation), P. A. Buell & Co., Eaton, Newell & Buckley, Louis Epstein & Co., Fresno National Bank, Stockton Lumber Co., Kutner, Goldstein & Co., Bank of Central California, J. J. Swain, H. Bently, Francis Cogswell and Stanley W. Dexter, Appellees. Transcript of Record. Upon Appeal from the United States Circuit Court for the Northern District of California. Filed November 28, 1904. F. D. Monckton, Clerk.

330 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1142.

ATLANTIC TRUST COMPANY, a Corporation, Appellant,
vs.
E. C. CHAPMAN, Receiver of the Woodbridge Canal and Irrigation Company (a Corporation), *et al.*, Appellees.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing three hundred and twenty-nine (329) pages, numbered from one (1) to three hundred and twenty-nine (329), inclusive, including the index and cover thereto, to be a true copy of the printed transcript of record upon appeal from the United States Circuit Court for the Northern District of California, in the above-entitled case, as the original and copies thereof were printed under my supervision pursuant to the provisions of rule 23 of the rules of practice of the said the United States Circuit Court of Appeals for the Ninth Circuit and as said original remains of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, this 9th day of August, A. D. 1906.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

331 No. 1142.

United States Circuit Court of Appeals for the Ninth Circuit.

ATLANTIC TRUST COMPANY, a Corporation, Appellant,
vs.
E. C. CHAPMAN, Receiver of the Woodbridge Canal and Irrigation Company, a Corporation; P. A. BUELL & Co., EATON, NEWELL & BUCKLEY, LOUIS EPSTEIN & Co., FRESNO NATIONAL BANK, STOCKTON LUMBER CO., BANK OF CENTRAL CALIFORNIA, J. J. SWAIN, H. BENTLY, FRANCIS COGSWELL, and STANLEY W. DEXTER, Appellees.

Proceedings had in the United States Circuit Court of Appeals for the Ninth Circuit.

Upon Appeal from the United States Circuit Court for the Northern District of California.

332 *Index to Proceedings had in the United States Circuit Court of Appeals for the Ninth Circuit.*

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333 At a Stated Term, to wit, the October Term, A. D. 1905, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the Court-room, in the city and county of San Francisco, on Wednesday, the seventh day of March, in the year of our Lord one thousand nine hundred and six.

Present: The Honorable William B. Gilbert, Circuit Judge; Honorable Erskine M. Ross, Circuit Judge, Honorable Thomas P. Hawley, District Judge.

No. 1142.

THE ATLANTIC TRUST COMPANY, a Corporation, Appellant,
vs.
E. C. CHAPMAN, Receiver, etc., *et al.*, Appellees.

Order of Submission.

Ordered, appeal argued by Mr. Elliott McAllister, counsel for the appellant, and Mr. E. C. Chapman, in *propria personam*, and submitted to the Court for consideration and decision.

334 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1142.

ATLANTIC TRUST COMPANY, Appellant,
vs.
E. C. CHAPMAN, Receiver, STANLEY W. DEXTER ET AL., Appellees.

Opinion U. S. Circuit Court of Appeals.

J. J. Scrivner for the Appellant.
E. C. Chapman and Stanley W. Dexter, Appellees in person.

Before Gilbert and Ross, Circuit Judges, and Hawley, District Judge.

GILBERT, *Circuit Judge*, delivered the opinion of the court.

This case was before this court before on appeal from a decree sustaining the demurrer of the appellant, the Atlantic Trust Company to the petition of E. C. Chapman, receiver, for an order requiring the Trust Company to pay the costs and expenses of the receivership. Chapman *v.* Atlantic Trust Co. *et al.*, 119 Fed. 257. This court adjudged that the demurrer should have been overruled and held that where the costs and expenses of the management of mortgaged property by a receiver in a suit, which costs and expenses were authorized by the court and exceed the proceeds of the property when sold, together with its earnings and the court has expressly retained
335 jurisdiction over the subject matter and the parties until the final settlement of the receiver's accounts, it has power on such settlement to render a judgment for the deficiency against the complainant at whose instance the receiver was appointed and continued and the expenses incurred. The cause was remanded to the Circuit Court for further proceedings. The Trust Company then filed its answer to the receiver's petition. Thereupon the matter was submitted to the Circuit Court as upon bill and answer. Upon consideration thereof the court entered a decree adjudging that the Trust Company pay to the receiver the costs and expenses in accordance with the prayer of his petition. From that decree the present appeal is taken.

Upon submission of the cause as upon bill and answer, the Trust Company was entitled to the benefit of all denials in the answer of the matters set forth in the petition and all matters properly pleaded in the answer, and the question at issue was what was a proper judgment upon the facts presented by the petition and not denied in the answer together with the facts properly pleaded in the answer. Reynolds *v.* Crawfordsville Bank, 112 U. S. 405; Banks *v.* Manchester, 128 U. S. 244.

The appellant contends that upon the case now presented the equities are with it and that certain allegations of the petition which

stood admitted upon the record when the case was formerly before this court, are now eliminated by reason of denials in the answer, such as the allegation that the expenses were incurred on the motion or request of the appellant, that the receiver acted upon its assurances as to the sufficiency of the property to pay the foreclosure expenses, that the foreclosure was irregular and collusive and that the acts of the appellant contributed to the delay of the suit and its disastrous result. The appellant urges that the receiver himself was the
336 person best acquainted with the situation at all times and that he should have given warning that future expenses might result in a deficit upon a sale, that so far as the final disaster was due to human mistakes it was due to the mistakes of the receiver and his employés, and particularly to his selection of an engineer at the instance of others, and that the delays which prolonged the receivership until the break-down of the dam, were due to matters beyond the appellant's control, such as intervention in the suit by outside parties and the litigation resulting therefrom. The answer sets up reasons, some by way of argument, others by statement of facts, why the appellant should not be held liable for the expenses of the receivership. It does not deny any of the material facts alleged in the petition. It alleges as matter of defense that the Canal & Irrigation Company was a quasi public corporation; that all the expenses were incurred by the receiver as the officer and hand of the court, not as the agent of the appellant nor for its benefit, but for the benefit of all concerned including the public. It alleges, and this is one of the principal defenses relied on, that the appellant is a corporation enjoying high credit in commercial communities throughout the United States, and that had it been known or understood by persons taking the receiver's certificates that it was personally liable upon them, the certificates would have been readily subscribed at a low rate of interest instead of being placed with difficulty at the high rate of 10 per centum per annum. We do not see how this defense can avail the appellant to avoid its liability. It was bound to know the law and to know the nature of the obligation which it assumed in asking the court to appoint the receiver to manage the property. It must be presumed to have had notice of the progress of the case, the difficulties of the receivership, the expenses thereof and the issuance of receiver's certificates together with the difficulty of disposing of the same. If its
337 credit in the commercial world would have been of aid in disposing of the receiver's certificates at a lower rate of interest, it had the opportunity to use its credit for that purpose. It brought the foreclosure suit at the request of stockholders, it is true, but it was not bound to resort to the court or to ask for the appointment of a receiver. The trust deed gave it the option to sell at public auction the entire property in case of default in the payment of interest.

The appellant relies on the defense of laches as against its liability for the costs incurred by the receiver. It has not specified the laches in pleading that defense in its answer, but it argues that the facts show that it was kept in unsuspecting quiet until the time had ex-

pired when it could either bid upon the foreclosure sale or redeem from that sale, or appeal from the foreclosure decree, and that had there been any claim that it would be held responsible for the deficit caused by the receiver's management of the property, there can be no doubt that it would have protected itself by bidding at the sale up to the full amount of the deficit, whereby it would have had the property to exploit or sell. This argument is based upon the assumption, unsupported by anything discoverable in the record, that the property on the foreclosure sale sold for less than its full value. We are not warranted in assuming that it sold for less. If it did, was it not the duty of the Trust Company, protecting the bondholders, to see that it did sell for its full value or to redeem in case it did not? Its duty to itself to avoid payment of receiver's expenses was no greater than its obligation to its *cestuis que trustent* to protect their interests in the foreclosure sale. We can discover no ground for imputing laches to the receiver. It was not among his duties to advise the appellant of his understanding of its legal liability to him. It
338 was its duty to know it.

It is contended that the bondholders should have been made parties to the receiver's petition and the proceedings thereunder, and that they should bear their due proportion of the expenses with the bondholders at whose particular instance the suit was brought and whom the appellant represented in the foreclosure suit, that this contention is especially sustainable as to the intervening bondholders who did become parties to the foreclosure proceedings, and that thereby they became co-complainants and assumed their proportion of the costs and expenses of the litigation. Some of the intervening bondholders appeared in the double capacity of creditors of the corporation and holders of its bonds. The record shows however, that they were compelled to intervene as bondholders for the reason that the appellant, whose duty it was to represent and protect all the bondholders, refused to represent the interveners and attacked and assailed the validity of their bonds. It is true that the intervenors were allowed costs, but their costs have not been paid nor are such costs included in the sums adjudged to be paid to the receiver. In the proceeding to adjust the receiver's account and to fix liability for the payment of the amount due him, it may be that all bondholders might, upon their own application have been admitted as parties, and perhaps it would have been within the discretion of the trial court to order that they be made parties upon a plea of the appellant suggesting non joinder of parties. They were not necessary parties however. To have brought them in would have been to inject into the case a controversy between the trustee and its *cestuis que trustent* in which the receiver had no interest. The case was one primarily between the receiver and the appellant. Its determination was not affected by the fact that the latter acted in a representative capacity in incurring the liability, the bondholders being represented
339 by him and interested only consequentially. Kerrison, Assignee *v.* Stewart, 93 U. S., 155. The appellant may have the right to demand reimbursement from the bondholders for the expenses of the receivership, but that is a question which is not before

us. When the appellant took this appeal it served a citation upon certain of the bondholders who were not parties to the proceedings, and one of them, Stanley W. Dexter, as holder of the majority of the bonds, appeared in person in this court and presented his brief. We may consider his appearance as that of *amicus curiæ*. We find no ground for saying that the Circuit Court erred in dealing with the case as one between the appellant and the receiver or in adjudging that the former pay the expenses of the receivership. The decree is affirmed.

(Endorsed:) Opinion. Filed May 14, 1906. F. D. Monckton, Clerk.

340 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1142.

THE ATLANTIC TRUST COMPANY, a Corporation, Appellant,
vs.
E. C. CHAPMAN, Receiver of the Woodbridge Canal & Irrigation Company, a Corporation; P. A. BUELL & Co., EATON, NEWELL & BUCKLEY, LOUIS EPSTEIN & Co., FRESNO NATIONAL BANK, STOCKTON LUMBER Co., KUTNER, GOLDSTEIN & Co., BANK OF CENTRAL CALIFORNIA, J. J. SWAIN, H. BENTLEY, FRANCIS COGSWELL, and STANLEY W. DEXTER, Appellees.

Decree U. S. Circuit Court of Appeals.

Appeal from the Circuit Court of the United States for the Northern District of California.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of California, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

[Endorsed:] Decree. Filed and Entered. May 14, 1906. F. D. Monckton, Clerk.

341 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1142.

THE ATLANTIC TRUST COMPANY, a Corporation, Appellant,
vs.
E. C. CHAPMAN, Receiver, etc., *et al.*, Appellees.

Certificate of Clerk U. S. Circuit Court of Appeals to Proceedings, etc.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing ten

(10) pages, numbered from one (1) to ten (10), inclusive, to be a true copy of all proceedings had in the above-entitled case in the said the United States Circuit Court of Appeals for the Ninth Circuit as the same remain of record in my office, and that the same in connection with the preceding certified copy of the printed Transcript of Record from the United States Circuit Court for the Northern District of California in the above-entitled case constitute a true copy of the entire record therein.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, this 9th day of August, A. D. 1906.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk*.

342 UNITED STATES OF AMERICA, *ss*:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Being informed that there is now pending before you a suit in which The Atlantic Trust Company, is appellant, and Edgar C. Chapman, Receiver of The Woodbridge Canal and Irrigation Company *et al.*, are appellees, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the Circuit Court of the United States for the Northern District of California, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United
343 States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 16th day of October, in the year of our Lord one thousand nine hundred and six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

344 [Endorsed:] Docketed. File No. 20,378. Supreme Court of the United States. No. 413, October Term, 1906. The Atlantic Trust Co., *vs.* E. C. Chapman, Receiver, &c. Writ of Certiorari. Docketed. No. 1142. United States Circuit Court of Appeals for the Ninth Circuit. Filed Oct. 31 1906. F. D. Monckton, Clerk.

345 United States Circuit Court of Appeals for the Ninth Circuit.

1142.

ATLANTIC TRUST COMPANY (a Corporation), Appellant,
against
EDGAR C. CHAPMAN, Receiver of the Woodbridge Canal and Irrigation Company, a Corporation, Appellees.

It is hereby stipulated that the transcript already filed in the Clerk's office of the Supreme Court of the United States with the petition for the writ of certiorari be taken as a return to said writ dated the 16th day of October, 1906.

STANLEY W. DEXTER,
J. J. SCRIVNER,
Counsel for Atlantic Trust Co.
E. C. CHAPMAN,
Receiver, in Person.

(Endorsed:) Stipulation of Counsel as to Return to Writ of Certiorari. Filed Oct. 31, 1906. F. D. Monckton, Clerk.

346 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1142.

ATLANTIC TRUST COMPANY, a Corporation, Appellant,
vs.
E. C. CHAPMAN, Receiver of the Woodbridge Canal & Irrigation Company, a Corporation; P. A. BUELL & CO., EATON, NEWELL & BUCKLEY, LOUIS EPSTEIN & CO., FRESNO NATIONAL BANK, STOCKTON LUMBER CO., KUTNER, GOLDSTEIN & CO., BANK OF CENTRAL CALIFORNIA, J. J. SWAIN, H. BENTLEY, FRANCIS COGSWELL, and STANLEY W. DEXTER, Appellees.

Certificate to Stipulation of Counsel as to Return to Writ of Certiorari.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the next preceding page to be a true copy of a stipulation of counsel as to return to writ of certiorari, filed in the above-entitled cause on the 31st day of October, 1906, as the original thereof remains on file and of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, this 15th day of November, A. D. 1906.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

347 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1142.

THE ATLANTIC TRUST COMPANY, a Corporation, Appellant,

vs.

E. C. CHAPMAN, Receiver of the Woodbridge Canal & Irrigation Company, a Corporation; P. A. BUELL & Co., EATON, NEWELL & BUCKLEY, LOUIS EPSTEIN & Co., FRESNO NATIONAL BANK, STOCKTON LUMBER CO., KUTNER, GOLDSTEIN & Co., BANK OF CENTRAL CALIFORNIA, J. J. SWAIN, H. BENTLEY, FRANCIS COGSWELL, and STANLEY W. DEXTER, Appellees.

Return to Writ of Certiorari.

By direction of the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, I, Frank D. Monckton, Clerk of the said Court, in obedience to the annexed writ of certiorari issued out of the Honorable the Supreme Court of the United States and addressed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, commanding them to send without delay to the said Supreme Court the record and proceedings in the above-entitled cause, do attach to the said writ a certified copy of a stipulation entered into between the counsel for the respective parties to the said cause, the original of which stipulation is on file and of record in my office, and do
348 hereby certify the said stipulation as due return to the said writ.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, this 15th day of November, A. D. 1906.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk*.

[Endorsed:] 413, 20378, Nov. 21, '06.

349 [Endorsed:] File No. 20,378. Supreme Court U. S. October Term, 1907. Term No. 109. The Atlantic Trust Company, Petitioner *vs.* Edgar C. Chapman Receiver &c. Writ of Certiorari and return. Filed Nov. 20th, 1906.

Office Supreme Court U. S.
FILED
SEP 29 1906
JAMES H. McKENNEY,
Clerk.

No. 109.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

No.

THE ATLANTIC TRUST COMPANY,
Petitioner,

versus

EDGAR C. CHAPMAN, Receiver of THE WOODBRIDGE CANAL AND IRRIGATION COMPANY ET AL.

Petition for Writ of Certiorari.

EDWARD B. WHITNEY,
STANLEY W. DEXTER,
Of Counsel.

C. G. BURGOYNE, Walker and Centre Streets, N. Y.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE ATLANTIC TRUST COMPANY,
Petitioner,

VERSUS

EDGAR C. CHAPMAN, Receiver of the Woodbridge Canal and Irrigation Company, *et al.*

No. .

Petition for Writ of Certiorari.

The Atlantic Trust Company, the petitioner, respectfully presents to this Court this its petition for a writ of *certiorari* addressed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court and the Clerk thereof to certify to this Court the record and proceedings wherein this petitioner is appellant and Edgar C. Chapman Receiver of the Woodbridge Canal and Irrigation Company and others are appellees, and to certify therewith the opinion of said Circuit Court of Appeals therein, in order that the said cause may be reviewed and determined by this Court, as provided by law.

Due notice of this application has been given to all appellees who appeared in the Court below.

Statement of Facts.

This was a foreclosure suit. The Atlantic Trust Company, the petitioner, was complainant as Trustee for bondholders. The Woodbridge Canal and Irrigation Company was defendant. Edgar C. Chapman was appointed Receiver by the Circuit Court for the Northern District of California. Various intervenors were subsequently admitted as defendants. A decree of foreclosure and sale was duly entered after nearly three years of vexatious litigation with these intervenors. Meanwhile, owing to the delays and unforeseen disasters hereinafter set forth, the defendant's property so depreciated in value that it did not sell for enough under the decree to pay the Receiver's expenses and certificates. After the time for appeal from the decree had expired the Receiver for the first time set up a claim that this complainant was personally liable for the deficit; and petitioned for a personal decree against it. Complainant demurred to the petition and on this demurrer it was dismissed by MORROW, J., on the authority of 31 Oregon, 237 (see appendix). The Receiver then appealed to the Circuit Court of Appeals for the Ninth Circuit, which reversed the dismissal, disapproved the Oregon case and held the complainant liable for the full amount (Chapman vs. Atlantic Trust Company, 119 Fed. Rep., 257).

Complainant then petitioned this Court for a writ of *certiorari*. Although a brief was filed by some of the leading counsel of the City of New York, headed by the late Wheeler H. Peckham, asking the Court to take the case and decide it, the petition was denied (188 U. S., 741). It was the belief of the undersigned and of these intervening counsel, although without any information upon the subject other than was afforded by the record, that the petition was denied either because of certain defects in the record, or because the Court did not consider the decree as final; for cer-

tainly there was never a decision of more startling novelty, or more squarely opposed to the existing authority upon the subject.

This complainant then answered the petition upon the merits, denying some of its allegations and setting up a considerable number of new and affirmative defenses. The Receiver thereupon moved for judgment as upon bill and answer. By this motion he, of course, abandoned all of his allegations which were not admitted, and at the same time admitted the truth of all of the affirmative allegations interposed by us (2 Wheat., 380, 384; 112 U. S., 405, 409; 128 U. S., 244, 251; 160 U. S., 247, 257; 65 Fed. Rep., 690; 71 Fed. Rep., 576, 577; 1 Daniell Ch. Pl. and Pr., 829).

His petition will be found at pages 225-39 of the present record, and the answer at pages 255-84 thereof. The consent that the case be heard as upon bill and answer is at page 289. The Court upon the hearing took judicial notice of certain of its records, as requested by this complainant. The records so noticed are recited in its judgment at page 300 and appear in the record upon appeal. They had been incorporated in the answer by reference, and were also independently noticeable under the practice of the Court (141 U. S., 240, 243; 150 U. S., 31, 38; 168 U. S., 124, 129; 169 U. S., 39; 17 Am. & Eng. Cycl. of Law, 925) which practice was followed by consent in the present case. The net result was a personal judgment against this complainant for the sum of $36,207.57, with interest at seven per cent. and costs (pp. 303-4).

The case as thus now presented to the Court is in brief as follows:

The suit was to foreclose an ordinary trust mortgage, was conducted in the customary way, without any bad faith or collusion whatever and the Receiver was appointed by the Court on the usual application (pp. 261-3). It proceeded to a decree which was in all respects favorable to complainant, except that it admitted certain intervenors to participate in the benefits of the sale (pp. 170-212). The final decree of fore-

closure and sale contained no adjudication that the complainant was in any way responsible for any part of the Receiver's expenses, certificates or compensation, *and it reserved no power to the Court to modify it at any time after the confirmation of the sale thereunder;* nor did it reserve a right to modify in any particular except as to the upset price, the manner of sale, and the items of property to be sold (p. 212). The alleged reservation of jurisdiction noted in the opinion of the Circuit Court of Appeals was contained only in a supplementary order or decree confirming the sale (pp. 213–222).

There was great difficulty in making a sale, and the *decree or order of confirmation* was not entered until nearly a year after the decree of foreclosure. This so-called *decree of confirmation* provided that the Receiver should thereafter render his account to the Court, and that the Clerk should report the deficiency for its further consideration and action; and *purported to retain jurisdiction* of the cause and parties until the coming in of such reports and final action of the Court thereon, and payment of the balance of the costs and expenses of the proceeding, and of the advances and indebtedness of the Receiver or until the further and final order of the Court (pp. 221–2). The Receiver waited almost another year before filing his report (pp. 225–39), and did not raise his present contention, that the complainant was personally liable for the deficiency, for fifteen months (pp. 240–1).

The affirmative allegations of the answer show that the complainant was in nowise responsible for the delays incident to the proceeding, or for any of the misfortunes which caused its disastrous result. *The delays* were caused by litigation instituted by intervenors, in which litigations the complainant was largely successful, although to some extent the intervening petitions were granted; but at all times proceedings were pending, the defense to which was justified by subsequent success, and which necessitated a postponement of the entry

of the final decree of foreclosure (Answer pp. 265–70; Clerk's Docket, pp. 161–9; opinions at 79 Fed. Rep., 39, 842; 86 *Id.*, 975). *The disasters* were due to the giving way to the main dam, owing to hidden defects in construction. So far as any human being can be charged with any responsibility therefor, it is the Receiver himself and his agents (pp. 270–6).

The Receiver's certificates were issued by order of the Court on petition of the Receiver, and largely for repairs which afterwards turned out to be useless, owing to the fact that the Receiver was not properly advised by the agents whom he had selected, one of whom, by an irregular and unauthorized act, he had taken upon the nomination of the farmers of the vicinity (pp. 272–6; Receiver's Reports, pp. 42–56, 60–2, 71–5, 147–51). Moreover the certificates although bearing ten per cent interest, were sold with great difficulty, owing to the fact that it was not stated by anybody nor believed by any of the persons taking the certificates that this complainant was personally liable for them, the complainant being a corporation enjoying very high credit in the commercial community all over the United States (p. 280). They were not regarded as issued for the benefit of complainant, but of the farmers (pp. 149–50 and 71–4). The orders under which they were issued were in language which rather excluded than permitted the inference that there could be any personal liability thereon (pp. 62, 66, 77), and the Receiver himself did not think that the parties stood behind them (see pp. 74–5), nor did any holder of his paper ever indicate such an idea (Answer, p. 280).

Neither the Receiver, nor his counsel, nor any of the certificate holders notified the complainant of any claim that it was personally liable until this petition was filed. The weight of all previous authority was against such claim. Meanwhile the time to appeal from the decree had elapsed, and the time to redeem the property from the sale under the decree had also elapsed; although part of the certificates were illegal

and unauthorized, and if there had been any claim of personal liability, opposition would have been made to their allowance (pp. 280–1).

The Receiver's petition has come twice before the Circuit Court of Appeals. Each time the Court has been held by the same three judges (GILBERT, ROSS and HAWLEY). They have decided against complainant upon all points. Their decision upon the first appeal reversed that of Judge MORROW (Opinion is hereto annexed), who held that a complainant is not liable for any deficiency caused by the Receiver unless provision had been made for such liability when the suit was commenced or the Receiver appointed (see Record on former application, No. 557 of October Term, 1902, pp. 43–4). He followed the unanimous opinion of the Oregon Supreme Court in Farmers' Loan and Trust Co. vs. Oregon Pacific Railroad Co., 31 Oreg., 237, stating that the views there expressed were in accord with his own opinion. The Oregon court (whose opinion is hereto annexed), regarded its decision as in accord with the law of receivership as laid down by the leading authorities in this Court. Since the decision of the Circuit Court of Appeals, substantially the same question has been under consideration by the Supreme Court of Alabama in Wills Valley Co. vs. Galloway, 139 Ala., 276, decided in January, 1904; and that Court unanimously held that without some special equity the complainant is not personally liable. The equities here are with the petitioner.

The decisions of the Circuit Court of Appeals are thus opposed to the weight of authority, including those of two State Supreme Courts, one of them within the Ninth Circuit (which are the only other appellate tribunals before which the precise question has come), as well as to that of one of the Circuit Judges in their own jurisdiction. We respectfully submit that few

questions are more fundamental or important or interesting than the principal question raised by this record, which may be stated as follows:

Is a complainant, who has in good faith and with diligence prosecuted a suit upon a good cause of action, and upon whose application the Court has properly appointed a Receiver, and who obtains a decree fully establishing his rights, nevertheless personally responsible for a deficiency caused by the failure of the property which is the subject of the suit to bring enough to cover the allowances which had been made by the Court to the Receiver and his counsel, and the expenses which the Receiver, upon his own judgment, supported in part only by a direction of the Court, and without special request of the complainant in any instance, had incurred?

This is a question so startling that it had apparently never occurred to anybody to ask until within the last few years.

ARGUMENT.

I.

The conflict in opinion between the high appellate tribunals which have passed upon the above question makes it one eminently proper to be considered by this Court.

As we have shown, there is a conflict between three Judges of the Ninth Circuit on the one side and one of their number, reinforced by the Supreme Court of Oregon and in effect also by the Supreme Court of Alabama, on the other.

II.

The question is one of very great practical importance.

For this reason, when we made our previous and probably premature application to this court, a brief was filed in support of the application by the late Wheeler H. Peckham of the New York Bar, which brief was signed also by Messrs. Adrian H. Joline, William B. Hornblower, Herbert B. Turner, John E. Parsons, William W. Green and Allan McCulloh, representing in all seven of the principal trust companies of that city. We quote from that brief as follows (see RECORD No. 557, October Term, 1902):

> "There are several questions raised in the record in which we have no interest, and hence do not discuss them.
>
> "There is one in which all corporations and

individuals, a part of whose business it is to become mortgagees in trust for the holders of bonds issued by the mortgagor, are vitally interested, and which we desire to submit to the Court.

" That question is whether a mortgagee in trust to secure bondholders is liable for receiver's obligations and compensation where the income and proceeds of the sale of the property are inadequate to pay the same.

" The Court below has answered that bald question in the affirmative.

" It holds that a plaintiff mortgagee in trust, who has moved for and so obtained the appointment of a receiver, with the usual powers to operate, *pendente lite*, is because thereof liable to the receiver for any deficiency in the property held by the receiver, to pay the obligations and compensation of the receiver.

" It would seem that no question could be of more general importance. The highest Court of the State of Oregon has decided against the proposition. The Circuit Court of Appeals of the Ninth Circuit has decided in its favor.

" The question has never before arisen or been decided in this Court.

" It affects every one of the numberless mortgage foreclosure suits at any time pending in any Court in the United States.

" It is not a question of statutory construction. It is a question as to what is the law of the United States, or of any State, which any Court may be called upon to administer.

" In the particular concrete case it is a question as to what is the law of the United States as to obligations assumed by suitors in its Courts." * * *

" It would seem that the issue of a *certiorari* is peculiarly called for by this case. Surely the judgment below must be regarded as a novelty in jurisprudence.

" Without any express promise to assume this personal liability; without the existence of any facts from which such promise can be implied; with a judgment absolutely in plaintiff's favor; without the imposition of any condition upon which relief is granted; without any option ever having been offered to assume or decline any such liability, the Court below has imposed upon the complainant a personal liability for indebtedness and compensation of the Receiver.

" It, too, has done this when the proceeds of sale were sufficient to pay compensation to the Receiver and proved insufficient only because applied in priority to the payment of debts for which the Receiver was *not* personally liable.

" If this be law it is fair to complainants, especially when trustees, that they should be advised of it by the adjudication of the highest court; and if it be not law, that they should be relieved from apprehension of an almost limitless liability, because of the mere appointment of a Receiver over whose actions they have no control.

" An issue of the *certiorari* here applied for, and the determination thereof, would relieve the situation and provide a rule uniform in all the circuits as to what responsibility is assumed by a complainant trustee in asking the appointment of a Receiver.

" Is it not fairly one of those questions of general and pervading interest to reach which this remedy of *certiorari* is especially applicable and for which it was intended ? "

III.

The decision of the Circuit Court of Appeals in this case is inconsistent with well settled and fundamental principles of the law of receivership.

We quote again from Mr. Peckham's brief as follows :

> " All authorities agree that the property of which the receiver takes possession is the primary fund for payment of his compensation and obligations.
>
> " All authorities agree that the compensation and personal expenditures of the receiver are the first lien on the property or fund in his hands; ahead of the lien or interest of any party for whose benefit the receiver holds possession.
>
> " All authorities agree that the receiver is not the agent of plaintiff or defendant, but of the Court, and that he can be directed only by an order of the Court; and all agree that it is the duty of the receiver to so administer the property that it may become of use and benefit to whomsoever may prove to be entitled to it and may not become destroyed or burdened beyond its value while possessed by the receiver.
>
> " In no text book and in no reported case is it suggested that if the receiver finds the property so situated as to need the expenditure of money upon it, that the complainant is bound or liable to furnish that money.
>
> " In all such cases the receiver or complainant makes application to the Court for leave to borrow the money, for payment of which the receiver does not even become personally liable.
>
> " Not only that, but the lien of his certificates on the fund is junior to that of his compensation.

" It is clear in this case that there is no express contract by the complainant to pay this receiver.

" How can a contract or promise to pay be implied when the sole duty and obligation of the receiver are to take care of the property for the benefit of the complainant or others entitled, and when to encumber it even at all would be a breach of trust unless pursuant to an order of the Court?

" It is, however, suggested that there are many cases holding the parties liable to the receiver.

" We agree.

" In a certain way it may be said that all parties are liable to the receiver.

" A defendant who fails always has to pay the receiver; because the receiver's compensation is taken out of the property and the balance only applied to the payment of the debt, and the surplus is less or the deficiency greater.

" A complainant who has failed to establish his claim to the *res*, whether because of matter in abatement or in bar, may be liable to the defendant for the receiver's fees which the defendant has had to pay to the receiver in possession in order to get back his property.

" He *may* even be liable directly to the receiver if the judgment be that the plaintiff had no right in the *res* and it has been taken from the receiver by one having paramount right and from whom the receiver had no right to retain the property for compensation or fees.

" Pittsfield Bank vs. Bayne, 140 N. Y., 321, and Howe vs. Jones, 66 Iowa, 156, are illustrations.

" These and similar cases are but the reverse of the liability of defendant in that payment of the costs of receivership diminishes the amount of surplus or increases the amount of the deficiency for which the debtor is liable.

" In these cases judgment was rendered *against* the plaintiff. It was adjudged that the plaintiff

had no lien on or interest in the property which plaintiff had caused to be seized, and that as the seizure was wrongful and the receiver could not deduct his fees before turning over the property, the plaintiff might be liable to pay them *because the plaintiff had failed in his suit.*

"But where, as in this case, the plaintiff has succeeded, where the judgment is completely in his favor, we submit that there is no principle on which the plaintiff can without his consent be made liable to the receiver."

Neither party can give any orders to the Receiver or in any way control his actions. He does not, in any proper sense of the word, "serve" them or either of them. He is the bailiff of the Court, and, during the pendency of the suit, the Court is in adverse possession.

In the first case in this Court on the subject, in 1854, Mr. Justice WAYNE said that the Receiver "is an indifferent person between the parties," "an officer of the court;" that it "is the court itself which has the care of the property in dispute. The Receiver is but the creature of the court" (*Booth vs. Clark*, 17 How., 322, 331). "He is not appointed for the benefit of either of the parties, but of all concerned" (*Davis vs. Gray*, 16 Wall., 203, 218). In the familiar case of a railroad receivership, as has been so often held in connection with Receivers' certificates and with questions of priorities, "all concerned" include the public as well as the parties; and an irrigation company like the mortgagor in the present case is also a *quasi* public corporation (*Fall Brook Irrigation District vs. Bradley*, 164 U. S., 112), so that the Court cannot be considered as having been operating this property for the benefit alone of the complainant, defendant and intervenors. *Non constat* but that had these parties all desired the presevation of the work to be abandoned, the Court might have considered it in the public interest to disregard their wishes. This Court has always

maintained the position that a Receiver is an agent of the Court and derives no authority from the act of the parties at whose suggestion or by whose consent he is appointed (*Chicago Union Bank vs. Kansas City Bank*, 136 U. S., 223, 236; *Quincy, Missouri & Pacific R. R. Co. vs. Humphreys*, 145 U. S., 82, 97).

The lower Federal Courts have always maintained the same doctrines. See, for instance, *Texas & St. Louis Ry. Co. vs. Rust*, 17 Fed. Rep., 275, 282; *Central Trust Co. vs. Wabash, St. Louis & Pacific Railway Co.*, 23 Fed. Rep., 863; *New York, P. & O. Ry. Co. vs. New York, L. E. & W. Ry. Co.*, 58 Fed. Rep., 268, 278. Thus in the Wabash case, where the Receivers had been originally appointed upon the petition of the railway company, and the mortgagees afterwards applied for their reappointment as Receivers in the foreclosure suits, Mr. Justice BREWER, then Circuit Judge, said (23 Fed. Rep., at p. 868), in overruling the application: "As we look upon it, the receivers are not receivers for either party. They are simply the hand of the court. In the process of the litigation the court has taken possesion of the property, and holds it neither for the mortgagor nor the mortgagee, and it matters not, for the ultimate determination of the suit, at whose instance the receivers were appointed. They act for neither party. They represent neither party. They stand here simply as the hand of the court, holding the property for disposition at the end of the litigation, for the benefit of all. So I cannot see what can be gained as a legal proposition by a new order of appointment extending the receivership, as counsel say, to the trust company, the mortgagee."

The Receiver, thus being the agent of the Court and not the agent of either party, there is no legal principle upon which his contract may be treated as the contract of either party. This obvious fact has been often noticed in various ways. Thus, in *Turner vs. Peoria & Springfield R. R. Co.*, 95 Ill., 134, 145-6, decided in 1880, where the question raised was whether Receivers'

certificates were negotiable, the Court held them non-negotiable upon the following reasoning : " Whether, in any event, they are payable in full depends upon the question whether the fund under the control of the court is sufficient for that purpose. That fact cannot be known except upon inquiry into the amount of such certificates issued by the officer authorized to act, and as to the value of the fund to be administered." This case is referred to in all the text-books as authoritative. It was followed in 1883, in *McCurdy vs. Bowes*, 88 Ind., 583, 584–5, where the Court said that such a certificate " is the mere acknowledgment that a debt is due the payee, payable out of a specific fund."

Mr. Beach says, as to Receivers' certificates, that " there is no one personally liable for their payment " (Beach on Receivers, § 416). Mr. Smith says that such a certificate " is payable solely from the funds of the receivership, and that there is no responsible party back of them to be made liable in case of default " (Smith on Receivers, § 287). Mr. High's statement is to the same effect (High on Receivers, § 398*e*).

In England, where Receivers' certificates do not seem to be used, the Receivers are personably liable unless special arrangements are made to the contrary. They are indemnified out of the fund, but the idea that the parties applying for Receivers are personally liable upon any theory seems never to have suggested itself (Kerr on Receivers [London edn., 1900], p. 208 ; *Burt vs. Bull*, 1895, 1 Q. B., 276, 279, 280, 282, 284).

Judge CALDWELL, of the Eighth Judicial Circuit, who had had wide experience in these matters, delivered an address on " Railroad Receiverships in the Federal Courts," which was reprinted in the " American Law Review " in 1896, and has had wide circulation and citation, especially in the Western States. Speaking of the Receiver, he says positively that " neither party is responsible for his contracts " (30 American Law Review, 162).

It is respectfully submitted that upon this view of the law, held by everybody and questioned by nobody,

immense numbers of business transactions, great and small, have been based. Receivers have had to pay high prices because they could give no security except that of the fund in court. For the same reason their certificates have carried very high interest, or been sold at great discount, or both. The complainants in the more important cases have been usually trust companies possessed of large means and high credit. Judge GILBERT says in his opinion at page 338 : " It (the trust company) was bound to know the law and to know the nature of the obligation which it assumed in asking the Court to appoint the Receiver to manage the property." But the law was generally regarded as imposing no personal liability whatever in such cases— until the remarkable decision in this case.

Had it not been regarded as established law that there was no personal responsibility on any party's part for the expenses of a receivership, many great properties would have been at once sacrificed, which, by means of Receivers' certificates, sold at a discount have been carried through hard times and put on a sound basis again under direction of the Courts.

The learned Circuit Court of Appeals evidently considers that this is a case where one of two innocent parties must suffer because somebody did not have foresight enough to see that the property was not of sufficient value to warrant an expensive receivership, and comes to the conclusion that the suffering must be cast upon the absent trust company rather than upon the Receiver, notwithstanding that the latter was on the ground and charged with the duty of knowing all about the property, a duty for the performance of which he and his counsel divided up between them six-sevenths of its total value. It is submitted that there are two complete answers to this suggestion : First, that there is no principle in the law of agency or elsewhere upon which such a liability can be imputed to a complainant, whether the complainant or the Receiver may have been the party more responsible morally for the loss ; and second, that the Receiver and his coun-

sel, so far as their own compensation is concerned, and the recipients of certificates and time checks, so far as their compensation is concerned, are persons who must be presumed to have understood the risk which they were taking and to have secured payment for that risk. If the Receiver and his counsel were willing to keep on working, and the other persons concerned to keep on assisting in the Receiver's work or supplying him with materials, although there was no warrant for supposing that anybody would be personally liable for their compensation, while the text books on the subject were unanimous in stating the contrary, there is no more justice than there is law or equity in now mulcting the complainant in order to pay their losses.

Examination of the authorities cited by the learned Circuit Court of Appeals in its first opinion (119 Fed. Rep., 257) show that none of them are in point. So far as they approach the subject at all, they may be divided into three classes (we add some also which were not cited by it): first, those which hold that when the *order appointing the receiver is illegal* and was improperly obtained by the plaintiff, it would be inequitable to charge the expense upon the property, and, therefore, it must be charged to the plaintiff, a familiar rule of obvious correctness (*Pittsfield Nat. Bank vs. Bayne*, 140 N. Y., 321, 330–1, per PECKHAM, J.; *French vs. Gifford*, 31 Iowa, 428; *McAnrow vs. Martin*, 183 Ill., 467; *Link Belt Co. vs. Hughes*, 195 Ill., 413); second, those which hold that when the receivership order was legal, but the plaintiff is finally defeated in the suit, the chancellor has power to charge the receivership expenses upon him as *part of the costs* (*Highley vs. Deane*, 168 Ill., 266; *City of St. Louis vs. St. Louis Gas Light Co.*, 87 Mo., 223; *Cutter vs. Pollock*, 7 N. Dak., 631), although this power can be exercised only when the plaintiff's action in commencing suit and obtaining a Receiver involved an impropriety (*Ferguson vs. Dent*, 46 Fed. Rep., 88, 96–8; *Elk Fork Oil Co. vs. Foster*, 99 Fed. Rep., 495); and third, when there was no fund at all for the Receiver to take, so that his acts in tak-

ing possession of the property were in derogation of the rights of the lawful owner, whose rights could and should have been respected by the plaintiff. This last exception has had two different applications: first, to the case of a receivership in a suit against A, the property turning out to belong to B, who had no interest in the controversy (*Howe vs. Jones*, 66 Iowa, 156); and second, when the receivership is of an equity of redemption, the property is not sufficient to take care of the prior mortgage, and the plaintiff has failed to obtain the consent of the mortgagee to the receivership (*Tome vs. King*, 64 Md., 166; *Ephraim vs. Pacific Bank*, 129 Calif., 589), and even then, if the equities favor the complainant, it will alter the rule (*Ephraim Case* (2d appeal), 136 Cal., 646; *Wills Valley Co. vs. Galloway*, 139 Ala., 276).

IV.

The point is not foreclosed by the denial of our former application for a writ of certiorari.

And this for two reasons:

In the first place, the situation now presented is very different from that presented upon the former application, as has been pointed out by us in our statement of facts. Then it was claimed to stand admitted by our demurrer that our client had induced the expenses sought to be charged personally upon it by requesting that they be incurred, and assuring the Receiver that the property would bear them; and the suit was claimed to be a collusive one. Now the Receiver has admitted the contrary to be true, and admitted facts showing that no easily imaginable case could be stronger in favor of the complainant than

this one—that if this complainant is responsible, then all complainants must necessarily be held responsible for receivership deficiencies (see Statement of Facts, *supra*).

In the second place, the former application was made at a preliminary stage of the action, and to review a decree which in effect sent the cause back for further proceedings—a situation in which this Court customarily refuses the writ, although, as there had been exceptional cases, we had hoped to secure it.

V.

There is also a further question of some importance in the case, and one which was not before the Court on the former application, the record then containing defects which prevented its presentation. This question is the following:

After a decree of foreclosure, and without reopening that decree, has the Court any jurisdiction to charge the expenses of the suit personally against any party thereto, unless jurisdiction to do so had been in some way reserved?

Complainant's then counsel, at the time of the original hearing on demurrer before Judge MORROW, failed to incorporate the decree of foreclosure in full into the record. Hence upon the appeal it could make only the point that *the decree confirming the sale* contained no sufficient reservation of jurisdiction. This point was overruled, by what we believe to be erroneous construction of the decree, but by a ruling which we would not for a moment suggest to be of sufficient general interest to form the basis of the issuance of a writ of *certiorari*. We submit, however, that the *decree*

of foreclosure is the final decree in a foreclosure suit, except so far as it expressly reserves jurisdiction or so far as jurisdiction is necessarily implied (as for the purpose of confirming the sale and distributing the proceeds). It is of course within the power of the Court to reserve any or all questions not absolutely necessary to be adjudicated before the sale. A familiar form is to be found at 118 Fed. Rep., 34; but the Court there in effect ruled that jurisdiction not expressly reserved did not survive, and hence that it had no jurisdiction to certify to this Court any jurisdictional question after the expiration of the term at which the decree was rendered.

The subject of costs is one which is customarily disposed of by the decree of foreclosure. It was so disposed of in the decree of foreclosure in the present case (pp. 174–8). The compensation of the commissioner for making the sale was fixed (p. 190) and provision was made as to what costs should be a personal charge upon parties to the suit (pp. 211–12). When the subject of costs is thus taken up and disposed of, and no right to modification reserved, its reopening cannot be regarded as a proper incident thereafter to a mere enforcing order. It is submitted that every party to a final decree of foreclosure and sale has an absolute right to absent himself altogether from all future proceedings, with a sense of security as against any claims not already adjudicated, excepting only if he be served with notice of an application to open or review that decree.

Therefore your petitioner avers that the present case is one in which it is proper for this Court to issue a writ of *certiorari* for the following reasons, among others:

1. Because there is an important conflict between the decision of the Circuit Court of Appeals for the Ninth circuit and the Supreme Court of Oregon in the same circuit.

2. Because the questions of law involved herein have not been passed upon by this Court.

3. Because in the interest of uniformity of decision, this Court should pass upon the questions of law involved herein.

4. Because in view of the large number of mortgages issued by quasi public corporations to trustees, said questions are of sufficient general importance and interest as to make it necessary that they should be determined by the Court of last resort.

Your petitioner, therefore, upon the printed transcript of record and of the opinion of the Circuit Court of Appeals herewith submitted, respectfully prays the issuance of the writ of *certiorari* as aforesaid.

Dated New York, September 6th, 1906.

EDWARD B. WHITNEY,
STANLEY W. DEXTER,
Of Counsel for the Atlantic Trust Company, Petitioner.

APPENDIX I.

IN THE CIRCUIT COURT OF THE UNITED STATES,

NINTH CIRCUIT, NORTHERN DISTRICT OF CALIFORNIA.

THE ATLANTIC TRUST COMPANY (a Corporation), Plaintiff, vs. THE WOODBRIDGE CANAL AND IRRIGATION COMPANY (a Corporation), Defendant.	No. 11950.

(MONDAY, MARCH 11, 1901.)

OPINION, MORROW, J.

(On order to show cause why judgment of deficiency should not be entered against the plaintiff.)

SCRIVNER & HOPKINS, attorneys for plaintiff.
FOX & GRAY, attorneys for Receiver.

MORROW, *Circuit Judge:*

On the 3rd of October, 1894, a bill in equity was filed in this Court by the plaintiff to foreclose a mortgage upon the property of the defendant, and for the appointment of a receiver, pending the termination of the foreclosure proceedings, to take charge of all the

corporation property, consisting principally of a system of irrigating canals, water rights and franchises, and certain lands and personal property connected therewith. The defendant appeared by counsel, and on the same day consented to the appointment of a Receiver, who was accordingly appointed, and entered into possession of the said property. On September 18, 1897, a decree was entered in favor of the plaintiff, and in accordance therewith the property was sold on August 15, 1898, for $21,000, a decree confirming the sale being entered upon that date.

It appears that under the decree of the Court this amount has been distributed, as compensation for the receiver, fees for the attorney for the receiver, and certain other fees including a *pro rata* payment of accrued interest, on Receiver's certificates amounting in all to $21,000. It appears further that there is still due on Receiver's certificates $42,848.96.

Upon the petition of the Receiver an order to show cause was granted for the purpose of ascertaining why the amount due to the Receiver and his employees, as shown by his final report in this case, should not be settled and allowed; why a judgment for the total amount of the deficiency should not be entered against the plaintiff, The Atlantic Trust Company; and why the Court should not issue such supplemental decree, or order, as would require the plaintiff to pay such deficiency.

I am of the opinion that provision should have been made when this suit was commenced, or at the time when the Receiver was appointed, for the payment of or security for the amount of his expenses, and for the redemption of whatever certificates might be issued by him, in the event that the proceeds of the sale of the property should prove insufficient. But such provision was not made at the time by the Court, and I am of the opinion that the Court is without authority to do so now. In Farmers' Loan Co. vs. Oregon Pacific R. R. Co., 31 Or. 237, this question was fully

considered, and the views there expressed are in accord with my opinion in the present case.

The order to show cause will, therefore, be discharged.

SOUTHARD HOFFMAN,
Clerk.

[ENDORSED:] Filed March 11th, 1901.

APPENDIX II.

OREGON SUPREME COURT.

FARMERS' LOAN AND TRUST COMPANY,
Respondent,

AGAINST

OREGON PACIFIC RAILROAD COMPANY ET AL.,
Petitioners-Appellants.

[31 Oregon 237]
38 L. R. A. 424

MAY 1, 1897.

Appeal by petitioner from an order of the Circuit Court for Benton County refusing to compel plaintiff to pay their claim for services rendered to a Receiver appointed in a proceeding to foreclose a mortgage which had been instituted by plaintiff. Affirmed.

Statement by BEAN, J.:

This is an appeal from an order of the Circuit Court of Benton County denying the petition of certain employees of the Receivers of the Oregon Pacific Rail-

road Company for an order requiring the plaintiff in the foreclosure suit, in which such Receivers were appointed, to pay the wages of the petitioners. On October 28, 1890, the Farmers' Loan and Trust Company, as trustee for the bondholders of the Oregon Pacific Railroad Company and the Willametta Valley and Coast Railroad Company, commenced a suit in the Circuit Court of Benton County to foreclose a mortgage on the franchise and property of the defendant corporations to secure the payment of the bonded indebtedness thereof, amounting, as alleged, to $15,000,000, and, on its motion, T. Egerton Hogg, the president of the corporation, was appointed Receiver and clothed by the Court with authority to operate the railroad and receive the income and earnings thereof, and to that end he was empowered, from time to time, to employ and discharge all needful assistants, managers, clerks, servants, agents and employees at such salaries and compensation as he might deem advisable. Under this appointment Hogg operated the road as a Receiver until March 6, 1893, when he was removed and one Hadley appointed in his place, who continued in the operation thereof until January 6, 1894, when he was also removed and another Receiver appointed. Under the management of Hogg and Hadley the earnings of the road were wholly insufficient to pay the expenses of the receivership, and, as a consequence, the wages of the employees were allowed to fall greatly in arrears, so that, at the time of Hadley's removal, there was due the petitioners herein a very large sum for wages and no funds whatever in the hands of the Receiver with which to pay it; and we take it (although not directly averred in the petition) that the Receiver had exhausted his power to float receivers' certificates.

Prior to this time several unsuccessful attempts had been made to dispose of the road under the decree in the foreclosure suit rendered on the 27th of April, 1891. In this condition of affairs some of the employees, despairing, and with reason, as the sequel showed, of ever being able to obtain payment of their

wages from the earnings or the *corpus* of the mortgaged property, filed a petition on January 26, 1894, setting out substantially the facts hereinbefore detailed, and praying an order of the Court requiring the plaintiff in the foreclosure suit to deposit in Court sufficient money for the payment of their wages. The petition was denied, and hence this appeal.

BEAN, J., delivered the opinion of the Court.

This is, so far as we can ascertain, the first recorded instance in the judicial history of railroad receiverships in which the trust fund was insufficient to pay the employees of the Receiver engaged in the operation of the road; and, hence, we are unaided in the determination of the question before us by any judicial decision directly in point. The contention of the petitioners seems to be that a Receiver of a railroad appointed in a suit to foreclose a mortgage on the road, clothed with authority to operate it, is as much the representative of the plaintiff as a Sheriff who levies upon property under a writ of attachment, and that the operating expenses incurred by him are costs or fees of the litigation, and, like the fees of the Sheriff in the case referred to, are collectable from the plaintiff. But this argument is based upon an entire misapprehension of a railroad Receivers' position and duties. He is not like a Sheriff in an attachment action, the agent of the plaintiff to the litigation, nor does the plaintiff have any control or authority over him whatever. He is agent and executive officer of the Court, which, by virtue of its high prerogative powers, lays its judicial hand upon the property which is the subject of controversy and controls and operates it for the use and benefit, not of either of the parties to the litigation, but for the public and whomsoever in the end it may concern. His acts and possession are the acts and possession of the Court. His contracts and liabilities in contemplation of law are the contracts and liabilities of the Court. The parties to the litigation have not the least authority over him, nor have they any right to determine what liabilities he may or may

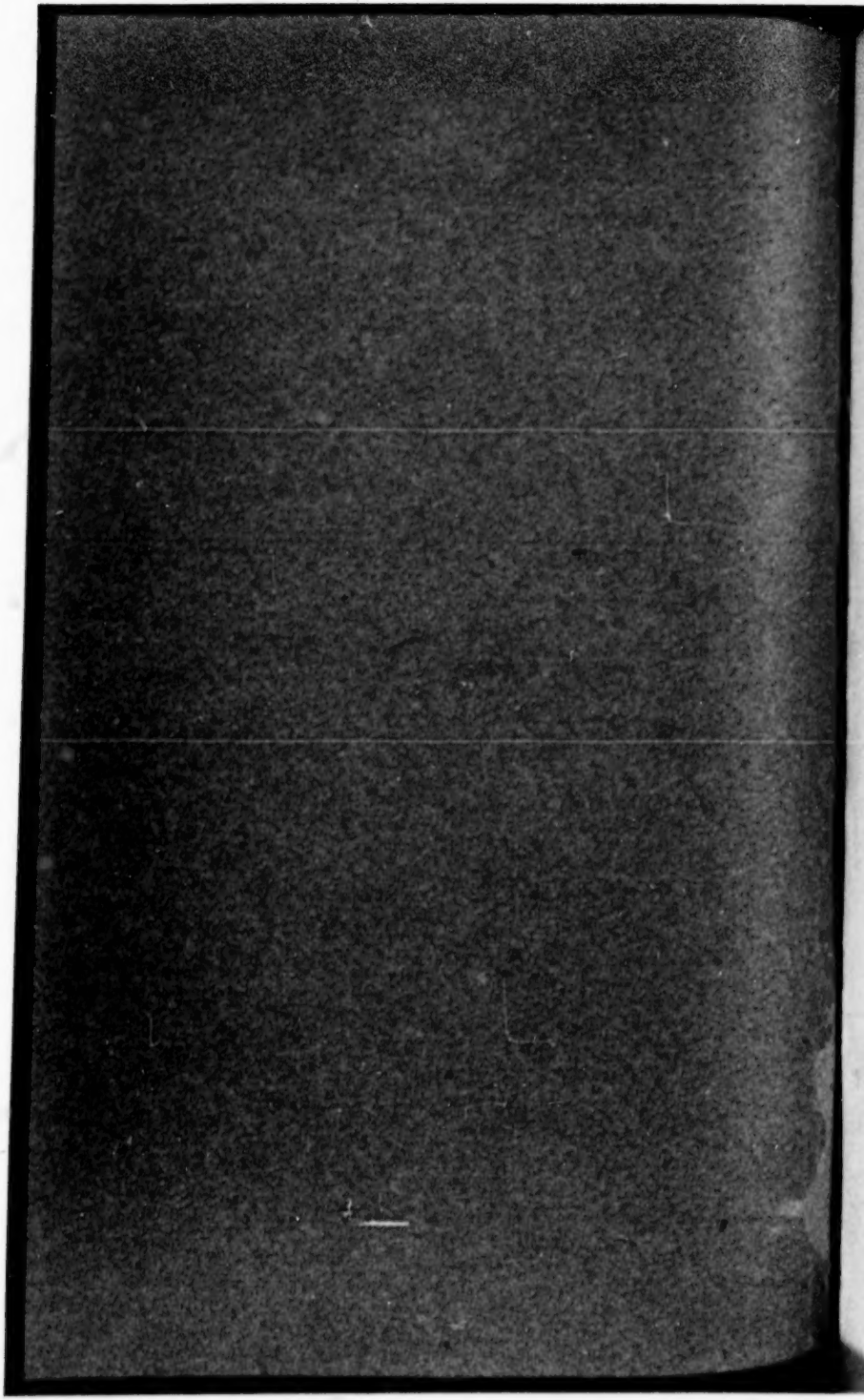
not incur. His authority is derived solely from the act of the Court appointing him, and he is the subject of its order only. "A receiver of a railroad," says Mr. Justice CALDWELL, "is a person appointed to receive and preserve the property of a railroad company, and is clothed with authority to operate the railroad, and receives the earnings and income therefrom during the pendency of the foreclosure suit. In contemplation of law, the railroad is in the custody of, and operated by the court appointing the receiver. The receiver is the agent of the court. He is an officer of the court, and his possession of the property is the possession of the court. He is not the agent of either party to the suit, and neither party is responsible for his contracts or for his malfeasance or misfeasance in office. * * * The liabilities incurred by the receiver in the operation of the road are, strictly speaking, the liabilities of the court appointing the receiver" (30 Am. L., Rev., 161). And in Quincy, M. & P. R. Co. vs. Humphreys, 145 U. S., 82, 36 L. Ed., 632, the Court, speaking of the Wabash Receivers, said: "They were ministerial officers appointed by the Court of Chancery to take possession of and preserve *pendente lite* the fund or property in litigation; mere custodians coming within the rules stated in Union Nat. Bank v. Bank of Kansas City, 136 U. S., 223, 236, 34 L. ed., 344, 346, where this court said: 'A receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property from that time into his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title, or even the right of possession, in the property.'" So, also, in the case of New York, P. & O. R. Co. vs. New York, L. E. & W. R. Co., 58 Fed. Rep., 268, it is said: "Receivers are but officers and agents of the court. While necessarily much is committed to their judgment and discretion, yet their power depends upon the decrees and direc-

tions of the Courts appointing them. Receiverships of railroad properties are in a large part peculiar appointments. Railroads as public carriers, are charged with great public duties, and the public are interested that their operations shall be continuous. Creditors are likewise interested that there shall be no cessation in their maintenance as going concerns, because their value as property depends upon the active use of the line. These considerations have developed the present well settled proposition that such Receivers are the mere custodians of the property, and hold for and as mere agents of the Court. Speaking of the character of such trustees, and the effect of such holding upon the interests procuring the appointment, Chief Justice WAITE said: "The possession taken by the Receiver is only that of the Court, whose officer he is, and adds nothing to the previously existing title of the mortgagees. He holds, pending the litigation, for the benefit of whomsoever in the end it shall be found to concern, and in the meantime the Court proceeds to determine the rights of the parties upon the same principles it would if no change of possession had taken place" (Fosdick vs. Schall, 99 U. S., 251, L. ed. 343; Quincy, M. & P. R. Co. vs. Humphreys, 145 U. S., 82, 36 L. ed. 632). "A Receiver represents no particular interest or class of interests. He holds for the benefit of all who may ultimately show an interest in the property. He stands no more for the creditor than the owner. They are not assignees, and the principles of common law applicable to assignees do not define or determine the character of a Receiver's possession, or its effects upon the rights of those interested in the property in their possession. Receivers ought not to be appointed to represent the peculiar interests of one class." To the same effect see Texas & St. L. R. R. Co. vs. Rust, 17 Fed. Rep., 275; Central Trust Co. vs. Wabash, St. L. & P. R. R. Co., 23 Fed. Rep., 863; Ames vs. Union Pac. R. R. Co. 60 Fed. Rep., 966; and Union Trust Co. vs. Illinois Midland R. R. Co., 117 U. S., 455, 29 L. ed., 970.

A railroad Receiver is, therefore, more than a mere custodian of the property, like a Sheriff holding under a writ of attachment or execution. He is, in effect, the hand of the Court, which holds the property while it operates the road pending the litigation for the benefit of the general public, as well as the creditors of the insolvent corporation. It is for this reason that the expenses of the receivership are chargeable as a lien upon the property superior to all other liens. The plaintiff, at whose instance the Receiver is appointed, thereby consents to the absolute control and management of the mortgaged property by the Court and its agents and to the priority of claims for the expenses incurred in its operation and management; but it is not perceived upon what ground it can be claimed that, because the expenses of the receivership are allowed without any fault of his to exceed the value of the mortgaged property, thus entirely destroying his security, he must, in addition to the loss of his debt, be compelled to make good the deficit, unless the order of appointment was made upon that condition. He has no control over the acts of the Receiver, and if without his consent he is to be held responsible therefor, he is liable to absolute bankruptcy and ruin. Such a rule would render the plaintiff's position so uncertain and precarious as practically to preclude him from any protection whatever through the appointment of a Receiver pending the foreclosure suit. But the inquiry is made, shall not a railroad mortgagee who applies for and obtains the appointment of a Receiver, with authority to operate the road, be held responsible for the liabilities incurred by such officer when they cannot be made out of the property itself? We think not, unless such responsibility was imposed as a condition to the appointment or the continuance of the Receiver in office. The appointment of a Receiver in a suit to foreclose a railroad mortgage is not a matter of strict right, but rests in the sound judicial discretion of the Court; and it may, as a condition to issuing the necessary order, impose such terms as may

under the circumstances of the particular case, appear to be reasonable, and, if not acceded to, may refuse to make the order (30 Am. L. Rev., 161; Fosdick vs. Schall, 99 U. S., 235, 25 L., Ed., 399). If, therefore, upon an application for the appointment of a railroad Receiver, it appears probable that the income and corpus will prove insufficient to pay the expenses and liabilities thereof, we have no doubt that the Court may require of the plaintiff, as a condition to such appointment, a guaranty of the payment of the expenses of such officer. And if, at any time after the appointment has been made, it becomes apparent to the Court that it will be unable to pay and discharge the present or future liabilities incurred by its executive officer and manager, it should refuse to continue the operation of the road under the Receiver, unless its expenses are guaranteed. No Court is bound or ought to engage or continue in the operation of a railroad or any other enterprise without the ability to promptly discharge its obligations, and, unless it can do so, it should keep out, or immediately go out of the business. But, unless such terms are imposed as a condition of the appointment or continuation in office of the Receiver, his employees must look to the property in the custody of the Court and its income for their compensation. They have no claim whatever on any of the parties to the litigation. They are the employees and servants of the Court, and not of the parties. Their wages are in no sense costs of the litigation; and, although incurred during the progress of the suit, they are not incurred in the suit. They are neither expenses of the plaintiff, nor of the defendant, and are not fees or costs which can be charged against the successful party to the litigation, as is sought to done in this case.

It follows that the order appealed from must be affirmed, and it is so ordered.



Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 109.

ATLANTIC TRUST COMPANY,
Petitioner,

vs.

EDGAR C. CHAPMAN, Receiver of the Woodbridge Canal and Irrigation Company *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITIONER'S BRIEF.

The writ of *certiorari* issued herein brings up for review a "Judgment and Decree" of the Circuit Court of the United States for the Northern District of California in proceedings supplementary to decree of foreclosure and decree of confirmation of sale under said foreclosure, had on final report and petition of E. C. Chapman, Esq., Receiver in said cause, praying for settlement of his final account, &c. The amended decree appealed from is found at pages 151-154 of the Record, and, by its terms, judgment was directed in favor of the said Receiver and against the complainant The Atlantic Trust Company for

deficiencies on account of Receiver's Certificates and advances made by and expenses incurred by the Receiver, after application of the net proceeds of sale of the property, aggregating, with interest to the date of the decree, March 30, 1904, the sum of $36,207.57, with interest thereon at 7 per cent. per annum and costs (Record, p. 154). This judgment was affirmed by the Circuit Court of Appeals for the Ninth Circuit (Opinion, at pp. 169-172; Decree of Affirmance, at p. 172 of Record). The appellant thereupon presented its petition to this Court for a writ of *certiorari*, which was duly granted (p. 173) on October 16, 1906, and in conformity thereto the record and proceedings in this cause have been certified and removed into this Court for its determination and review.

Statement of the Case.

I. History of Litigation.

The original title of the cause was "The Atlantic Trust "Company (a corporation) as Trustee of the trusts created by "the mortgage in this complaint described, Plaintiff,

vs.

"The Woodbridge Canal and Irrigation Company (a corpora- "tion), Defendant."

Record, p. 1.

The action was in foreclosure and was instituted in the United States Circuit Court for the Northern District of California.

The bill of complainant, filed October 3, 1894, set forth the trust mortgage in full, the issue of bonds thereunder, a default in payment of interest on September 1, 1894, waiver by defendant of certain conditions precedent to enforcement of default, and the request on the part of a majority of bondholders for the commencement of the action, and prayed for the appointment of a Receiver to take charge of the mortgaged property, and to maintain and operate the canals under the direction of the Court, for a determination of the number of bonds legally issued and outstanding, and for foreclosure and sale of the corporate property (Record, pp. 1-18). Chapman, the re-

spondent herein, was appointed such Receiver the same day, and qualified by filing a bond of $10,000 (pp. 20–22). Various intervenors from time to time were subsequently admitted as defendant's (p. 62, and see entries in clerk's docket, pp. 82–86). The bill was once amended, with reference to the number of bonds claimed to have been legally issued and outstanding (pp. 40–61). An order taking the amended bill *pro confesso* was entered on March 5, 1896 (p. 61). Owing to continued delays caused by the interventions (Answer, pp. 135–137) the decree of foreclosure and sale was not entered until September 18, 1897 (pp. 86–107). This decree was in all respects favorable to complainant, except that it admitted certain intervenors to participate in the benefits of the sale. Provision was made for the payments of costs and the Receiver's expenses and certificates out of the proceeds of sale. Owing to the delays and unforeseen disasters hereinafter more fully set forth (see also answer, p. 138), the defendant's property had so depreciated in value that great difficulty was had in making a sale, and it was finally struck down to one Thompson, acting on behalf of the Receiver and his attorneys, for $21,000, an amount just sufficient to cover the fees of the Receiver and his counsel, the commissioner's and clerk's fees and expenses for making the sale—and to make a small *pro rata* payment of $490.70 on the accrued interest on Receiver's certificates (p. 113), leaving unpaid all other expenses and certificates of the Receiver. The sale was confirmed by an order or decree entered August 15, 1898 (pp. 108–113), and the commissioner directed to deliver deed—in case redemption be not made of the property within six months (p. 112).

The period for redemption expired February 10, 1899, the Receiver remaining in possession until then (p. 115) and his final report and petition was filed August 3, 1899 (pp. 114–121) but was not acted upon nor brought to the complainants' attention until November 18, 1899, when an order was granted by Judge Morrow, ordering the complainant to show cause why the amount due the Receiver and his employees should not be settled and allowed and why judgment for the total amount of the deficiency shown by the clerk's report should not be entered against complainant.

When this order was served, the time for appeal from the decree of confirmation had already expired, as well as the

time for redemption, and no opposition could then be made to any of the items of expenses nor to the validity of any of the Receiver's certificates (Answer Twelfth Parag., p. 142).

Complainant at first demurred to the Receiver's petition and the demurrer was sustained by Judge MORROW (p. 126). On appeal to the Circuit Court of Appeals, the order of Judge MORROW was reversed (p. 127). The opinion of the Court on that reversal will be found reported, *sub nom.*

Chapman vs. Atlantic Trust Co., 119 Federal Reporter, 257.

The complainant then answered the petition upon the merits, denying some of its allegations and setting up a number of affirmative defenses.

The answer incorporated by reference considerable portions of the record of the case. These portions of the record were examined by the Court and are brought up here in the present record.

This answer is to be found at pages 129–144 of the record.

The petition is to be found at pages 114–121. The admissions and denials of the answer are set forth at pages 130–134; the affirmative matter being found at pages 134–143.

The cause was submitted to the Court below "as upon bill and answer" (p. 146):

> "By consent it is ordered that the receiver's *ex parte* motion to submit this cause on the issues joined by the final report and petition of receiver, and complainant's answer thereto, be and is granted; the receiver's solicitor waiving replication to complainant's answer, and complainant's solicitor consenting that this submission be as upon bill and answer."

The effect of this submission was that the petitioner admitted the truth of every allegation of the answer, and abandoned every controverted allegation of the bill.

Certain mutual and reciprocal admissions and waivers made by the parties upon the hearing are set forth at page 152.

Many allegations contained in the petition (which stood admitted by demurrer when the case was previously before the Court below) are now eliminated by reason of the denials in

the answer, viz., the allegations that the expenses were incurred on the motion or request of the plaintiff; that the Receiver acted upon the assurances of the complainant as to the sufficiency of the property to pay the foreclosure expenses; that the foreclosure suit was irregular or collusive; that the acts of the complainant contributed to the delay of the suit and its disastrous result.

The main facts which are now before the Court, as admitted, are that the suit was legally and properly commenced; that the Receiver was completely informed at the time of his appointment as to the circumstances of the case (pp. 132–134, 20, 6, 7) that the disastrous result of the foreclosure suit was one which could not have been anticipated by the use of ordinary foresight; that it was largely due to inherent defects in the location of the principal dam by the defendant, which defects were unknown to all parties and to the Receiver; that the Receiver himself was the person best acquainted with the situation at all times and was the one who, if anybody, should have given warning that future expenses might result in a deficit upon the sale; that so far as the final disaster was due to human mistakes it was due to the mistakes of the Receiver and his employees; that the delays which prolonged the litigation, and incidentally prolonged the receivership until the breakdown of the dam, were due mainly to matters beyond complainant's control, namely, to interventions by outside parties and delays caused by the litigation necessarily resulting, and by the pressure of other business upon the Court, so that immediate decision upon these difficult questions could not be obtained.

Judge MORROW constrained by the decision of the Circuit Court of Appeals, directed a judgment for the Receiver (pp. 151–154).

On appeal to the Circuit Court of Appeals, that Court, held by the same Judges (GILBERT, ROSS and HAWLEY) as on the first appeal, again decided against complainant on all points, reiterating its previous decision reported in 119 Federal, 257. The Court summarily disposed of all the defenses adverse to the complainant and affirmed the judgment (OPINION, pp. 169–172).

145 Federal Reporter, 820.

The items making up judgment appealed from are as follows (p. 153):

Balance on Receiver's certificates	$18,367.19
Receiver's advances	4,524.90
Time checks	8,348.85
Open accounts	3,309.15
Supplemental accounts	1,657.48
	36,207.57
Costs of special proceeding	173.55
Total	36,481.12

(N. B. There is a typographical error at top of page 154, which makes item $1,228 instead of $128.)

II. The Receiver's Certificates.

The order appointing the Receiver required him as soon as possible to make and file an inventory. It also required him to continue the operation of the works of the defendant company, keeping full accounts. On the day after his appointment he visited the works at Woodbridge, in the County of San Joaquin, for that purpose. He immediately took charge through a bookkeeper, and thereafter remained in charge through his superintendent and other agents and workmen. He became at once fully aware of the peculiar circumstances of the case, of the expensive and difficult nature of the operations, and of the shortness of cash. He learned that the property consisted of a system of canals, ditches and laterals, beginning at a dam in the Mokelumne River at the Town of Woodbridge. The defendant company had been operating this system, and supplying irrigation to farmers in the vicinity. His first report, drawn by his counsel and dated December 29, 1894, or less than three months after his appointment, shows that he was not acting in any way as agent for the complainant in the suit, but entirely upon his own responsibility, subject only—and even this he later little sought, as will appear—to the advice and control of the Circuit Court. Among other things, he caused such repairs as he considered necessary to be made upon the Woodbridge dam (pp. 22–30).

In this report the Receiver represented to the Court that

he was without funds, and prayed the Court for an order authorizing him to borrow the sum of $7,500 to be used for necessary expenses.

By the time that this report was filed, the first intervention had already taken place (p. 135). The bill for this purpose was filed by R. B. Salisbury and others on December 10, 1894, and caused litigation which continued pending until 1897. They appeared in court on January 21, 1895, at the hearing upon the Receiver's first report, although this complainant did not then appear (p. 30). The result of this hearing was an order authorizing the issuance of Receiver's certificates bearing interest at eight per cent. The order is not important, since the Receiver failed to find investors. This fact he submitted to the Court in his second report, which is to be found at pages 32, 33, of the record. It was filed January 31, 1895. He states fully the financial status at that time, together with the difficulties with which he was confronted. He reports that without borrowing money he would "be entirely unable to manage and care for the said property, to protect it from damage and loss, or to preserve defendant's title to water rights." He does not suggest in the most remote way that if the measures which he recommends should be adopted, there would be any risk whatever of a failure to realize at least the expenses of the receivership, The relief which he asked was permission to borrow not less than $5,000 (p 33),

> "and to issue therefor receiver's certificates, which shall be and constitute a first lien upon and preferred claim against the mortgaged property described in the complaint in this cause, *to be paid out of the proceeds of any sale made in this cause, or out of any other funds that shall come into the hands of this receiver applicable thereto.*"

It will be noticed that there is no suggestion here that the receiver's certificates should be a personal claim against the complainant or anybody else.

His report came before the Court on February 6, 1895. Both parties appeared, as also did the intervenors (p. 34). The complainant consented in open Court to the request of

the Receiver, who was accordingly authorized to borrow $5,000 (p. 34),

> " and to issue his certificate or certificates therefor, payable out of any funds that may come into his hands as such receiver applicable thereto, with interest thereon at such rate as he shall find necessary in order to secure such loan, *but not to excced ten per cent. per annum*, and that the certificates so issued shall be and constitute a first and prior lien upon all the property described in the mortgage for the foreclosure of which this action is brought, and if not paid prior thereto, then to be paid out of the proceeds of any sale of said property next after the costs of suit and sale, and before the payment of any other sum on account of said mortgage, or the indebtedness secured thereby."

Here again it will be perceived that there is no provision making the certificates a personal claim against anybody.

Under this order receiver's certificates were issued to an amount of $2,350, according to the receiver's fourth report (p. 75, Filed Aug. 10, 1897):

> " Even under this order I found myself unable to raise money on certificates issued by me thereunder, except in small sums raised from time to time, aggregating the sum of $2,350.00, and these were the only certificates ever issued under this or the first named order for money received, but in January and February, 1896, other certificates were issued in payment for labor and material to the amount of $5415.15, as shown by Exhibit D, hereto annexed" (see p. 81).

Besides the certificates issued for labor and materials the sum of $2,500 was borrowed in pursuance to an order of the Court, dated November 19, 1896, which is found at pages 39–40 of the Record.

> " Ordered that the said E. C. Chapman, receiver, be and he is hereby authorized to make and issue receiver's certificates to the further amount of twenty-five hun-

dred ($2,500) dollars to run for such period of time as he shall deem necessary and to bear interest at such rate as he shall find necessary in order to raise moneys thereon, not to exceed ten per cent per annum ; such *receiver's certificates, together with those already heretofore issued as aforesaid to constitute a first lien on the property of said defendant held by said receiver, payable out of the first moneys received from the sale of said property,* and the same or the proceeds thereof to be used by said receiver for the payment of taxes upon said property and of the current and necessary expenses for the management and care thereof."

Here again it will be noticed that there was no provision for any personal liability upon the certificates. Here again they drew 10 per cent. interest, a rate of interest which would never have been thought of had any personal liability on the part of the Atlantic Trust Company been supposed by investors to stand behind the proposed loan (p. 142).

It will be further noticed that the $5,415.15 of receiver's certificates issued as above stated were issued *without any prior authority from the Court.* Had they been issued for cash they would have constituted an overissue ; and they were issued for labor and materials (p. 76). They were, however, since confirmed by the decree (p. 88).

The total amount of cash received upon receiver's certificates was $4,850, and the total sum of certificates issued for cash, labor and material was $10,265.15 (Receiver's Report, p. 77).

III. The Receiver's Time Checks.

In addition to the certificates mentioned, the receiver issued from time to time certain quasi certificates, designated as "time checks" for labor, aggregating the sum of $5,728.89 (pp. 89, 116, 131, 153).

They were simply a form of receiver's certificate issued without prior order of the Court (see *supra*). Their precise language does not appear, but the name implies that they are statements signed by the receiver to indicate the

amount of time spent by each person furnishing labor (see List at p. 89).

They stand in the same position as the certificates, except that they did not carry interest, until after the final decree of foreclosure, from which date interest at seven per cent per annum was allowed by the order appealed from (p. 153).

The time checks like the certificates, did not purport to constitute any liability on the part of the complainant (Answer, p. 131).

IV. Open Accounts.

The receiver incurred indebtedness to sundry persons for work done and materials and board furnished for men, for which no time checks or certificates were issued, amounting to the sum of $2,269.85 (pp. 90, 116).

This sum was included in the judgment appealed from, with interest from the date of the final decree of foreclosure at seven per cent per annum (p. 153).

V. Supplemental Accounts.

Between the date of the judgment of foreclosure (September 18, 1897) and the confirmation thereof (August 15, 1898), the receiver remained in charge of the property and incurred indebtedness to sundry persons for the care thereof, amounting to $1,028, and made certain disbursements to the amount of $529.40 (pp. 116, 154).

These items were admitted by stipulation in open Court as correct (p. 152), and were included in the judgment appealed from.

VI. Receiver's Advances.

The Receiver made advances in the administration, care and management of the property pending the suit of $6,605.72 and received $3,500 on account thereof (p. 88), leaving a balance due him of $3,105.72. This was included in the judgment appealed from, with interest at seven per cent. from the date of the judgment of foreclosure (p. 153).

VII. Disasters.

The expenses were largely and unexpectedly increased by a disaster which occurred to the company's dam on July 23, 1895, when,

> " without any warning or means of prevention, the " river undermined the easterly portion of the dam " and carried away the east abutment thereof. This " caused the river to change its channel and flow over " the land formerly occupied by the abutment " (Receiver's Report of Aug. 10, 1897, p. 75).

The dam was repaired by the farmers and others dependent on the water supply, of which expense $5,415.15 was paid by the issue of Receiver's certificates, as above mentioned (*id.*, p. 76).

Up to this time there appears to have been no doubt in the Receiver's mind as to the advisability of these repairs. He decided the question on his own responsibility and does not claim to have consulted the Court or the complainant at this juncture. We do not wish to be understood as criticising his action. We think there was strong ground for it, *although not in the complainant's interest, but in that of the general public, which this quasi-public corporation was bound to serve.*

As will be seen, the future disasters were due either to the insufficiency of the repairs made by the engineer selected by the farmers or to the fact, which by this time the Receiver ought to have discovered, had he selected an engineer more competent, that the whole enterprise was bound to end in disaster unless the location of the dam were entirely changed.

As no report was made to the Court by the Receiver until more than a year after this accident of 1895, it may be inferred as a fact that, as he was advised and believed, there was no reason whatever to doubt that the *property would amply repay the expenses of the suit and of the receivership.* He remained evidently of the same opinion at the time of his fourth report, a few weeks before the final decree.

On July 26, 1896, came the second and more serious disaster to the dam.

> "On this last-named day the dam was again undermined at the same place where the river broke through the preceding year. It was thought by the engineer in charge, upon the completion of the repairs, that it would be impossible for the river to undermine the dam again, as he claimed that the sheet piling was driven far down into a bed of blue clay which was supposed to form the bed of the river. But the fact that the river undermined the same is proof that his opinion was not correct. The foundation of the dam and the superstructure thereof still stand intact but the sheet piling, by which the water is prevented from flowing through or under the dam, is not sufficient to hold the waters of the river. I am informed by civil engineers that there is a well defined bed of clay in the bed of the river at the place where the dam was constructed, but from my experience with this work of repair and the result thereof, I am led to believe that it is not as good as it should be for such a dam as was constructed, and that thereafter it will be wise to make repairs on the theory that there is no bed of blue clay under the river" (p. 38).

The receiver now at last decided to act no longer upon his own responsibility and the advice of the farmers and of the engineer Pidge, but to apply to the Court. On August 13, 1896, between two and three weeks after the disaster, he filed his third report, informing the Court of the two breakdowns and of the amount of expenses thus far incurred, together with the indebtedness incurred by him by reason of the receiver's certificates and timechecks and cash loaned (p. 38). *In describing these it is noticeable that he does not make any suggestion of having received assistance through any credit given to the complainant.* The expenses not paid for out of earnings or receiver's certificates are stated to have been

> "paid by time checks issued to employees for labor and by cash raised *upon my own personal credit* and advanced for the purposes aforesaid."

The then present situation he describes as follows :

> " By reason of this last washing away of the dam, farmers, holding water rights for about three thousand acres of land, have been cut off from the use of water at a time when it occasioned a loss of about one-third of their income from their lands for the current year, and unless the dam can be restored before the winter rains, will deprive them of water for the ensuing year ; the value of the works and property will be very greatly depreciated and much loss will necessarily occur to all parties interested. *I am unable to raise further funds on receiver's certificates.* The farmers are not inclined to make further contributions, and the property, if offered for sale, would not, in my judgment, in its present condition, bring anything near its worth, and yet the longer it remains in its present condition, the more it is likely to depreciate. The water of the river has not gone down sufficient as yet to enable us to determine the extent and nature of the repairs necessary to restore the structure and preserve the efficiency of the works, but in my judgment it will require from $2,000 to $5,000 to accomplish the same."

While he does not distinctly and affirmatively say so, his opinion is evidently that the property ought to be repaired. His recommendation is that (p. 39)—

> " in my judgment the time has come when, in order to preserve the property, *some steps must be taken by the parties interested in the property for supplying funds* for its protection, care and repair, *or* some order of the Court should be made for the final disposition thereof."

Clearly he represented to the parties and the Court that all parties interested regarded the expenses theretofore incurred as not involving the credit of " the parties interested in the property."

The situation now appeared to the Receiver sufficiently grave to apply to the Court to terminate the Receivership and sell the property on the ground that it was " constantly suffering and

"depreciating in value for want of funds" (p. 35) and a motion was made to that effect.

The complainant obtained adjournments of the hearing from time to time for about three months, but it is not claimed by the Receiver that he said anything to intimate that injury would be caused by this delay. The irrigation season was over. If repairs were to be made, it was sufficient that they should be made in time for the season of the following year, and action was delayed as he says "in view of an anticipated early final decree in this cause" (p. 76).

This hoped for result was prevented by delays caused by the vexatious interventions which will be next referred to. And the motion terminated in an order of the Court (McKenna, J.) authorizing the issue of $2,500 additional Receiver's certificates for the payment of taxes and current and necessary expenses (Order of Nov. 19, 1896, p. 39).

By the expenditure of this sum, together with such other sums as were available to the Receiver, the dam was repaired and rebuilt, the regular channel improved "to prevent further breakage," and (p. 78):

> "Besides this, the canals, locks, gates and ditches have been put in and are now in better condition than ever before."

VIII. Interventions.

From the outset of the litigation numerous complicated and vexatious interventions occurred delaying the entry of the final decree. The litigation over them was active as is fully set forth in the answer to the Receiver's petition (p. 135), and shown by the entries in the Clerk's docket (pp. 81-86). These interventions required extended investigation into questions of fact and arguments upon difficult questions of law, which were taken under advisement by the Court for considerable periods of time, and as to which ultimately the complainant was in part, and certain of the intervenors, in part successful. Various decisions of the Court thereon will be found reported in 79 Federal, 39; 79 Federal, 842; 86 Federal, 975; 86 Federal, 975; to which reports the appellant begs to refer.

One of the most important of these interventions was that of P. A. Buell & Co. and eight others, who sought recognition for certain bonds issued as collateral security only. They were admitted as parties defendant June 12, 1896 (p. 72). The legality of these bonds was disputed.

The Buell intervention raised an issue of fact which had to be tried, and was finally submitted on a stipulation, November 30, 1896. It was decided favorably to the intervenors on April 5, 1897 (p. 72). The opinion of the Court will be found at 79 Federal Reporter, 842.

We will not burden this statement with details of the other interventions. Their history is fully narrated in the sixth clause of the answer at pages 134-137, and fully sustain the allegation at page 137:

> "Examination of the clerk's docket will show that the delays in this case, which resulted in the lapse of nearly three years between the filing of the original bill of complaint and the entry on the final decree were almost entirely due to the interposition of these various bills of complaint and the petitions in intervention and these delays thus caused without fault on the part of this complainant caused the expenses of the receivership."

The amended bill of complaint had been taken *pro confesso* on March 5, 1896 (p. 62), and it is apparent from an examination of the clerk's docket that the parties were doing their best to bring the case to a final decree. It was finally wound up on August 9th, 1897, by the opinion of the Court (MORROW, J.) reported in 86 Federal Reporter, 975, to which we refer the Court as a clear resumé of the litigation and the final disposition of all the interventions and other controverted questions. The Court granted the motion for a final decree in favor of the complainant and the application for an order of sale was allowed.

IX. THE FINAL JUDGMENT OF FORECLOSURE.

On the day following the filing of this decision, August 10, 1897, the receiver filed his last report, which had been verified

on June 17 (pp. 73–81). There is nothing in this report to indicate that he felt any doubt about the recovery of his fees and expenses out of the property. He claims that his expenses of management have (notwithstanding all of the extraordinary disbursements) averaged less than half of those of the prior period (p. 77). He asks for an order (p. 80)

> "allowing a just and reasonable compensation to me as receiver for my services in this cause and providing for the payment thereof, and that a like order be made fixing and allowing a just and reasonable compensation for my counsel for his services as such and providing for the payment thereof; and that my accounts of receipts and disbursements as shown herein and my actions as such receiver be approved."

The matter was referred to a Master, who reported on September 2nd, and after some further incidental proceedings the final decree of foreclosure and sale was entered on September 18th, 1897 (pp. 86–108). It adjudges—

That defendant was in default and the mortgage a valid lien upon the preperty ;

That the cost and expenses of the foreclosure and the management and care of the property pending the action are as follows—

(a) Receiver's advances ;

(b) Receiver's certificates ;

(c) Receiver's time checks ;

(d) Money advanced by various persons for labor, materials and workmen's board " for which no time checks or certificates have been issued " ;

(e) Receiver's fees ($9,000) ;

(f) Receiver's counsel fees ($9,000) ;

(g) Claims for labor and materials furnished prior to suit ;

(h) Pidge's claim for services as engineer prior to suit ;

(i) McClelland's claim for services in keeping canals in repair ;

(j) Complainant's costs ($9,000) ;

(k) Costs of the Buell intervenors ($2,000).

That the items *(g)* to *(k)*, inclusive, were to be postponed to the others.

That after payment of the above sums the 79 bonds found to be valid should be paid out of the residue *pro rata*. These bonds were identified by number. Comparison with the Buell petition (p. 65) shows that they included, besides those represented by this complainant, the 12 bonds of the intervenor P. A. Buell & Co. The 15 remaining bonds were to be prorated to the extent of the amount actually advanced upon them.

That the Thompson intervention be dismissed.

That the other interventions be dismissed except in so far as they had been provided for among the preferred claims.

That the property be sold under the ordinary provision for sale under foreclosure, and payment out of the proceeds of the amounts due as above.

That the deed should be delivered to the purchaser "six months after confirmation of sale if no redemption thereof has been made" (p. 96); and that the purchaser should be let into possession upon confirmation.

Appointment of Commissioner to make the sale, with provision for his bond.

Particular description of the property to be sold.

Recovery of costs from certain intervenors.

The only reservation of jurisdiction in the decree is as follows (p. 107)—

> "This decree is given and made subject to modification by the Court at any time before final confirmation of sale, as to the upset or minimum price at which said sale may be made, and also as to the manner of sale of personal property or choses in action or securities thereunder; and subject to the right of the Court at any time before the sale to authorize the withdrawal of choses in action and securities from sale and the settlement, compromise and cancellation thereof."

X. Decree of Confirmation of Sale.

The subsequent proceedings as set forth in the "decree of confirmation of sale" which was entered August 15, 1898, and is set forth at pages 108–113 of the record. It appears that the commissioner offered the property several times for sale, and that there were bids, but that none of them were accepted by

the Court until Mr. Fox, the receiver's counsel, submitted a bid in his own name of $21,000 to be paid as follows : $3,000 in coin and $18,000 by filing satisfaction pieces of his own allowance and that of the receiver, these allowances as above stated having been $9,000 each. On August 10, 1898, the matter came into court, and Mr. Fox then asked leave to substitute for this bid a duplicate thereof signed by one G. Howard Thompson instead of by himself (p. 110). The Court decided after a hearing that these two allowances of $9,000 each (*e* and *f supra*) were entitled to priority of payment over the other first preferred claims (*a*, *b*, *c* and *d supra*) and therefore approved the bid, fixing the period of redemption at " six months from the said tenth day of August, 1898 " (p. 112). The Court further decided that the receiver's certificates came next in order among the first preferred payments, and that therefore, after paying the costs and the two $9,000 items, the balance (which turned out to be only $490.70) should be applied *pro rata* upon the certificates and that the clerk should report to the Court the balance due upon the other preferred items " for the further consideration and action of this Court thereon " ; and that the receiver should report between the date of foreclosure and the date of sale and transfer of possession thereunder " for examination and settlement."

Here at the close of the " decree " came the final clause which was considered by the Court below, as a reservation of jurisdiction to enter the judgment appealed from.

> " and it is further ordered, that jurisdiction of this
> " cause and the parties thereto be and the same is
> " hereby retained by the Court, until redemption is
> " made or title deeds have passed as herein provided,
> " and until the coming in of the reports of the said clerk
> " and receiver herein provided for, and the final action
> " of the Court thereon, and the final payment of the
> " balance of the costs and expenses of this Court and
> " its officers, and of the advances made and indebted-
> " ness incurred by said receiver which have been or
> " may be allowed by the Court, in the management and
> " care of the property placed in his charge, or until the
> " further and final order of the Court in that behalf "
> (p. 112).

XI. Final Report and Petition of Receiver.

The period of redemption expired February 10, 1899. The period for appeal expired August 15, 1899. The petition which instituted the present proceeding was verified and filed by the Receiver August 3, 1899, but he applied for no order to show cause thereon until November 18th of that year. It was not until the time to appeal as well as the time to redeem had expired, that the present claim of the Receiver was developed. The consequence is shown in the Twelfth clause of the answer, which is as follows (p. 142) :

> "And this complainant further shows that neither the receiver nor his counsel nor any of the holders of said certificates, time checks or claims gave notice to this complainant of any claim of personal liability on the part of the complainant for any of the matters set forth in this petition until the filing thereof, nor has any person up to this date given such notice except the receiver and his counsel ; and that by reason of such silence on their part this complainant permitted said claims to be adjudicated by said decree of September 18, 1897, without the opposition which would have been made had any claim of personal liability been raised, and in particular permitted the illegal and unauthorized receiver's certificates hereinbefore described to be confirmed by said decree and took no appeal from the decree in that regard."

As has been previously noted, the submission as upon bill and answer, has eliminated all controverted allegations of the petition. All that the Court considered are the undisputed facts, contained in the petition and the facts properly pleaded in the answer.

See Opinion of Gilbert, J., p. 169.

Particularly the charges of collusion and fraud constituting the "further and different reasons why the plaintiff should be compelled to pay all the costs and expenses" (p. 117) are entirely eliminated, and the Receiver's claim rests exclusively on the proposition that because the fund has proved insuffi-

cient to cover his fees and expenses he is entitled to the relief demanded.

His prayer for relief is as follows:

> "Wherefore your petitioner, the said Receiver, prays this Honorable Court that the balance due him on account of his receipts and disbursements since the making of said decree, and also the balance due to his employees as hereinbefore stated since the making of the report upon which said decree was based, and the compensation to be allowed to the said Receiver, and to his counsel since the date of said decree, be fixed and established by this Court, and that judgment be entered in favor of this Receiver, or of the clerk, or such other officer of the court as the Court shall direct against the plaintiff in this cause for the full amount of the deficiency hereinbefore stated, with the sums so allowed for services and expenses since the date of said decree, and that the proper process of Court be issued for the collection thereof from plaintiff, and that when collected the same be paid into court to be by the Court disbursed to the several persons entitled thereto."

XII. The Answer.

Besides categorical denials of the charges of collusion or fraud, or deception of the Court, or representations, the answer incorporated by reference considerable portions of the record of the case. It pleads that the defendant was a quasi-public corporation, and that all of the expenses were incurred by the Receiver as the officer and hand of the Court, and not as the agent of the complainant, and were not incurred at the request nor for the benefit of the complainant, but for the benefit of all concerned, including the public, and that all such expenses were adjudicated by the Court by the final decree of foreclosure and made payable by said decree out of the proceeds of sale and not by complainant personally, and that the judgment of foreclosure was *res adjudicata* as to the method of payment of said expenses, and that the Court was without jurisdiction to make any order, judgment or decree, adjudging the complainant to pay the same or any portion thereof (pp.

129-134, 140-1). The answer further sets forth fully the history of the litigation and the delays caused by the intervention and disasters (above referred to), and the good faith of the complainant trustee in all the proceedings (pp. 134–143); facts showing laches on the part of the Receiver, and that the equities are on the side of the complainant (p. 142); the non-joinder of the intervenors and other bondholders, for whose benefit the suit was commenced (pp. 142–3), and submits that the Receiver is not entitled to the relief demanded.

XIII. Judgment Appealed From.

The amended decree now appealed from not only holds the complainant responsible for the entire deficit, but confines the responsibility to the original complainant, letting out altogether the intervenors who were allowed to come in as parties on the same side with the complainant and who, as the answer avers, should be made to contribute (pp. 142–3).

It will be found in full at pages 151-154.

It is entitled in the original cause and designated:

Ameuded Judgment and Decree.

In proceedings supplementary to decree of foreclosure and decree of confirmation of sale under said foreclosure, had on final report and petition of E. C. Chapman, Esq., receiver in said cause, praying for settlement of his final account, and for the ascertainment and determination of the amount of the unpaid balance on account of moneys advanced by said receiver and on receiver's certificates issued by him as such under the order of this Court and consented to by the plaintiff in this cause, and on time checks issued by him for work and labor done, and for materials furnished and board of men, etc., all of which was allowed and ordered paid by this Court in and by the original decree of foreclosure entered herein on the 18th day of September, 1897, and also for the ascertainment and settlement of the further amount due to said receiver on account of further expenses and liabilities incurred for work and labor performed for him after the said decree of foreclosure, and while the mortgaged property still re-

mained in his charge and under his care as such receiver; and praying that judgment be given and made and entered herein, against the Atlantic Trust Company, the plaintiff in this cause, at whose instance and on whose motion the said receiver was appointed and expenses incurred, for the full amount of the balance so ascertained and determined to be due and unpaid, the same to be paid into court and distributed to the several parties or persons entitled thereto as the Court should direct.

It recites the previous demurrer proceeding and reversal by the Circuit Court of Appeals, the subsequent proceedings and hearing upon the report and petition and answer and judicial notice of certain records and files, which are enumerated; the stipulations as to certain items of expenditures subsequent to the judgment of foreclosure, and the waiver of further compensation by Receiver and counsel. It finds the amounts due the Receiver (as previously set forth herein) "for all of which under the laws and the facts "in this case, the plaintiff and complainant herein, the "Atlantic Trust Co., is liable," and adjudges as follows (p. 154):

"And it is further ordered, adjudged and decreed that judgment be, and the same is hereby, given, made and entered, in favor of said E. C. Chapman, receiver in this cause, against the complainant in this cause, The Atlantic Trust Company, for the said sum of thirty-six-thousand two hundred and seven $\frac{57}{100}$ ($36,207.57), with interest thereon from this date until paid at the rate of seven per cent. per annum together with his costs in this supplementary decree proceeding taxed at the sum of $173.55, the same to be paid by said complainant into court within 120 days from the date hereof, in lawful money of the United States, and if not so paid, then the receiver, said E. C. Chapman, to have execution therefor, for the full amount of said judgment and costs with interest on the principal sum as above provided, and upon collection thereof the amount so collected to be paid into court and the clerk of said court to distribute and pay the same over to the several parties entitled thereto, as shown by the decree of

foreclosure entered herein, and by the allowance now herein made upon settlement of payment or collection and payment into court that the said E. C. Chapman be finally discharged as such receiver."

Specification of Errors.

The assignment of errors is set forth at pp. 156–159 of the record.

We contend that the decree is erroneous in each and every one of the provisions by which the following amounts are charged personally upon the complainant:

"I. Deficiency remaining unpaid on account of receiver's certificates theretofore issued by said receiver in this cause."

"II. Deficiency remaining unpaid on account of advances made by said receiver in the care and management of the mortgaged property."

"III. Deficiency remaining unpaid on account of time checks issued for work and labor, held by divers persons and allowed in and by the said decree of foreclosure."

"IV. Deficiency remaining unpaid to divers persons for work and labor done, materials furnished and for board of men employed on said work allowed and ordered paid by the said decree of foreclosure."

"V. Deficiency remaining unpaid on account of advances made by said receiver in the care and management of the mortgaged property after the decree of foreclosure, and while the same remained in his charge and care, and on account of the advances made by said receiver to F. G. McClelland for services, work and labor during the same time, and on account of the advances made by said receiver to J. J. Hinckley for services rendered during the same time."

"VI. Together with interest on each and every one of the above amounts."

We also specify the following errors:

"VII. In not holding that the decree of foreclosure is *res adjudicata* as to the method of payment

of the items therein set forth, and that the Court had no jurisdiction to make any further order, judgment or decree with reference thereto, or to make any order, judgment or decree, ordering or adjudging that the complainant pay the same or any part thereof."

"VIII. In not holding that so long as the decree of foreclosure herein remains unopened, the Court had no jurisdiction to enter any order or decree *in personam* against this complainant, directing it to pay any part of the fees, expenses, certificates, time checks or other obligations aforesaid, but that they are collectible only out of the property under foreclosure."

"IX. In not holding that the receiver is barred from maintaining this proceeding by his laches and inequitable conduct in the premises."

"X. In not requiring the bondholders whose names are given in the 13th clause of the answer to be cited and made parties to the hearing upon the receiver's petition for judgment against this complainant."

The last specification, resting as it does in discretion, is not intended to be urged upon this appeal.

Questions Involved.

Two questions are presented by this Record:

I. *Is a complainant, who has in good faith prosecuted a suit upon a good cause of action, and upon whose application the Court has properly appointed a Receiver, and who obtains a decree fully establishing his rights, nevertheless personally responsible for a deficiency caused by the failure of the property which is the subject of the suit to bring enough to cover the allowances which had been made by the Court to the Receiver and his counsel, and the expenses which the Receiver, supported in part only by a direction of the Court, and without special request of the complainant in any instance, had incurred?*

II. *After a decree of foreclosure, and without reopening that decree, has the Court any jurisdiction to charge the expenses of the suit personally against any party thereto, unless jurisdiction to do so had been in some way reserved in the final decree?*

ARGUMENT.

I. By the submission "as upon bill and answer" the Receiver has admitted the truth of every allegation of the answer, and abandoned every controverted allegation of his petition.

The authorities upon this point are clear, and it was conceded by the Court below (Opinion of Judge GILBERT, p. 169).

Daniells Chan., Pl. & Pr., 6th Am. Ed., 829.
1 Ency. Pl. & Pr., 924.
Equity Rule 41.
Reynolds vs. Bank, 112 U. S., 405, 409.
Banks vs. Manchester, 128 U. S., 244, 251.
Leeds vs. Insurance Co., 2 Wheat., 380, 384.
In re Sanford Fork & Tool Co., 160, U. S., 247, 257.
Lake Erie & W. R. Co. vs. Bank, 65 Fed. Rep., 690.
U. S. vs. Flournoy Co., 71 Fed. Rep., 576.
Grether vs. Wright, 75 Fed. Rep., 742.
In re Waugh, 153 Fed. Rep., 281.

The answer becomes the only evidence the defendant needs in such case, but the Court also took judicial notice of certain records and files of the Court which are enumerated in the decree (p. 152), and are printed in the record, and of certain admissions in open court touching the supplementary expenses of the Receiver.

II. The Circuit Court was without power to compel the complainant to pay the deficit of a receivership which was in all respects regular, after final judgment in complainants' favor.

This writ of *certiorari* brings up for review the whole record, and this Court is not limited to questions to which the Circuit Court of Appeals was limited on the second appeal,

but may review the entire case, including the decision rendered on the first appeal.

Panama R. R. vs. Napier Shipping Co., 166 U. S., 280.

The Receiver's claim is based in his petition upon three grounds (pp. 116, 117):

1. That the items in question "are costs and expenses of "this Court and its officers necessarily incurred in the prosecu- "tion of said action and for which the plaintiff in said action "is primarily liable under the laws of the United States and "of the State of California and the rules and practice of the "Court."

2. That said expenses "were incurred on the motion and "the request of the said plaintiff; that of right they should "have been paid in advance by the said plaintiff, but upon "the assurance of said plaintiff that the property against "which it was seeking to foreclose was amply sufficient to pay "all the costs and expenses so incurred, and the whole amount "of the indebtedness for which said action was brought, they "were not so paid but were left to be paid out of the funds "arising from the sale of said property; that the proceeds of "such sale were wholly insufficient to pay even the costs and "expenses of the court in that behalf and that after applying "the proceeds of sale to the satisfaction of the costs and ex- "penses of sale, and of the compensation allowed to the said "receiver and his counsel in and by the said decree of fore- "closure, as authorized by the Court, the amounts hereinbe- "fore stated remain still unpaid and entirely unsatisfied."

3. "For other, further and different reasons" that by reason of alleged collusion between the complainant and the defendant, the appointment of the receivers and the continued custody of the property by the Court were fraudulently procured and hence the Receiver could lawfully look to the complainant for all expenses.

This latter cause of action has been abandoned by the Receiver, in view of the positive denials of the answer, and is eliminated from the case on this appeal.

So, also, with the allegation that the costs and expenses were incurred upon the motion and request of the complainant

or upon any assurance of the complainant as to the sufficiency of the property to pay such expenses.

Judge GILBERT's opinion (Record, p. 169) states the effect of the former decision in 119 Fed. Rep., 257 :

> "This Court adjudged that the demurrer should have been overruled and held that where the costs and expenses of the management of mortgaged property by a receiver in a suit, which costs and expenses were authorized by the court and exceed the proceeds of the property when sold, together with its earnings and the court has expressly retained jurisdiction over the subject matter and the parties until the final settlement of the receiver's accounts, it has power on such settlement to render a judgment for the deficiency against the complainant at whose instance the receiver was appointed and continued and the expenses incurred."

It will be noted that the receivership expenses are here called, as in the judgment (p. 88), "costs and expenses of the management" and not "costs of the suit"—which was the Receiver's contention below. They are certainly not costs between parties—and costs of administration are not taxable as costs of suit.

> St. Louis vs. St. Louis Gas Co., 11 Mo. App., 243 ; affd. 87 Mo., 224.

There is no inherent power in any Court to award costs, in the absence of statute, and where costs are authorized by statute, *they follow the judgment and are taxed to the losing party*, as was done in this case (Final Judgment, pp. 88, 107 ; *Wallace vs. Sheldon*, 76 North W. Rep., 418 (Nebraska) ; *In re Commissioners*, 20 App. Div., 271 (New York) ; *In re City of Brooklyn*, 148 N. Y., 107).

Priority is given to the *compensation* of Receivers and their solicitors over Receiver's certificates, and such allowances have sometimes been called "costs of the proceeding to be paid out of the fund" *(Petersburg Savings Co. vs. Dellatorre*, 70 Fed. R., 643 ; *Radford vs. Folsom*, 55 Iowa, 276).

There is no suggestion, however, that they can be taxed

against a successful party, and in the present case, the Receiver and his solicitors have been paid (p. 113).

The receiver's counsel has in prior arguments urged certain provisions of the California Code. It seems unnecessary for us to discuss these, since the equity practice of the Federal Courts is uniform throughout the United States and does not in any respects follow that which prevails in the various localities (1 Foster's Fed. Prac., 3d ed., pp. 10-12, 120-1; *Boyle vs. Zacharie*, 6 Pet., 648, 658; *First National Bank vs. Ewing*, 103 Fed. Rep., 168, 194; *Kirby vs. Lake Shore R. R.*, 120 U. S., 130, 137; *Goodyear Co. vs. Dancel*, 119 Fed. Rep., 692; *Phinizy vs. Augusta Railway Co.*, 98 Fed. Rep., 776). Even in common law actions, costs are not governed by provisions of State legislation (*U. S. vs. Treadwell*, 15 Fed. Rep., 532).

When the Receiver's application came first before Judge Morrow it was dismissed by him upon the following ground, which we shall maintain is still the true rule of law applicable to this case:

> "I am of the opinion that provision should have been made when this suit was commenced, or at the time when the receiver was appointed, for the payment of or security for the amount of his expenses, and for the redemption of whatever certificates might be issued by him, in the event that the proceeds of the sale of the property should prove insufficient. But such provision was not made at the time by the Court, and I am of the opinion that the Court is without authority to do so now. In Farmers' Loan Co. vs. Oregon Pacific R. R. Co., 31 Or., 237, this question was fully considered, and the views there expressed are in accord with my opinion in the present case."
>
> (Cited in 119 Federal, at p. 267.)

Prior to the decision of this case, the only authority directly in point was that which was approved and followed by Judge Morrow, namely, *Farmer's Loan & Trust Co. vs. Oregon Pacific R. R. Co.*, 31 Oreg., 237 (also reported 48 Pac., 706; 38 L. R. A., 424; 65 Am. St. Rep., 822). The gist of the argument is incorporated in the opinion of Judge Ross, found

at 119 Federal at page 268, and was dismissed with the remark that it "does not commend itself to our judgment."

We cannot state the reasoning for our contention better than in the words of Judge BEAN of the Supreme Court of Oregon, in the case above cited. While the learned Judge was speaking of a railroad receivership, his reasoning applies equally to every Receivership impressed with public or quasi-public duties as is the case of water or irrigation companies.

> "The contention of the petitioners seems to be that a Receiver of a railroad appointed in a suit to foreclose a mortgage on the road, clothed with authority to operate it, is as much the representative of the plaintiff as a Sheriff who levies upon property under a writ of attachment, and that the operating expenses incurred by him are costs or fees of the litigation, and, like the fees of the Sheriff in the case referred to, are collectible from the plaintiff. But this argument is based upon an entire misapprehension of a railroad Receivers' position and duties. He is not, like a Sheriff in an attachment action, the agent of the plaintiff to the litigation, nor does the plaintiff have any control or authority over him whatever. He is agent and executive officer of the Court, which, by virtue of its high prerogative powers, lays its judicial hand upon the property which is the subject of controversy and controls and operates it for the use and benefit, not of either of the parties to the litigation, but for the public and whomsoever in the end it may concern. His acts and possession are the acts and possession of the Court. His contracts and liabilities in contemplation of law are the contracts and liabilities of the Court. The parties to the litigation have not the least authority over him, nor have they any right to determine what liabilities he may or may not incur." * * *
>
> "A railroad Receiver is, therefore, more than a mere custodian of the property, like a Sheriff holding under a writ of attachment or execution. He is, in effect, the hand of the Court, which holds the property while it operates the road pending the litigation for the benefit

of the general public, as well as the creditors of the insolvent corporation. It is for this reason that the expenses of the receivership are chargeable as a lien upon the property superior to all other liens. The plaintiff, at whose instance the Receiver is appointed, thereby consents to the absolute control and management of the mortgaged property by the Court and its agents and to the priority of claims for the expenses incurred in its operation and management; but it is not perceived upon what ground it can be claimed that, because the expenses of the receivership are allowed without any fault of his to exceed the value of the mortgaged property, thus entirely destroying his security, he must, in addition to the loss of his debt, be compelled to make good the deficit, unless the order of appointment was made upon that condition. He has no control over the acts of the Receiver, and if without his consent he is to be held responsible therefor, he is liable to absolute bankruptcy and ruin. Such a rule would render the plaintiff's position so uncertain and precarious as practically to preclude him from any protection whatever through the appointment of a Receiver pending the foreclosure suit. But the inquiry is made, 'shall not a railroad mortgagee who applies for and obtains the appointment of a Receiver, with authority to operate the road, be held responsible for the liabilities incurred by such officer when they cannot be made out of the property itself?' We think not, unless such responsibility was imposed as a condition to the appointment or the continuance of the Receiver in office. The appointment of a Receiver in a suit to foreclose a railroad mortgage is not a matter of strict right, but rests in the sound judicial discretion of the Court; and it may, as a condition to issuing the necessary order, impose such terms as may under the circumstances of the particular case, appear to be reasonable, and, if not acceded to, may refuse to make the order (30 Am. L. Rev., 161; Fosdick vs. Schall, 99 U. S., 235, 25 L. Ed., 399). If, therefore, upon an application for the appointment of a railroad Receiver, it appears probable that the income and

corpus will prove insufficient to pay the expenses and liabilities thereof, we have no doubt that the Court may require of the plaintiff, as a condition to such appointment, a guaranty of the payment of the expenses of such officer. And if, at any time after the appointment has been made, it becomes apparent to the Court that it will be unable to pay and discharge the present or future liabilities incurred by its executive officer and manager, it should refuse to continue the operation of the road under the Receiver, unless its expenses are guaranteed. No Court is bound or ought to engage or continue in the operation of a railroad or any other enterprise without the ability to promptly discharge its obligations, and, unless it can do so, it should keep out, or immediately go out of the business. But, unless such terms are imposed as a condition of the appointment or continuation in office of the Receiver, his employees must look to the property in the custody of the Court and its income for their compensation. They have no claim whatever on any of the parties to the litigation. They are the employees and servants of the Court, and not of the parties. Their wages are in no sense costs of the litigation; and, although incurred during the progress of the suit, they are not incurred in the suit. They are neither expenses of the plaintiff, nor of the defendant, and are not fees or costs which can be charged against the successful party to the litigation, as is sought to be done in this case."

As against this well reasoned authority, the Circuit Court of Appeals stands alone, as we shall endeavor to show. And in view of the unbroken line of authorities, which we shall submit, it seems ironical for that Court to state (p. 171) "it "was not among his (Receiver's) duties to advise the appellant "of his understanding of its legal liability to him. *It was its* "*duty to know it.*"

We submit, however, that while there is so little authority directly in point upon either side of the question, there is a large amount of authority indirectly applicable, all of which is favorable to our contention, and which is of sufficient weight to be treated as establishing a rule of property. The

gist of Judge Ross' opinion (119 Fed., 257) is that while the Receiver is "not the agent of either party to the suit," "he is appointed to serve the parties interested," and that his appointment "is usually made at the request of the complainant," who, if the property was insufficient, "should not have asked the Court to make the appointment, incur the liabilities and pledge its faith to their payment," and that it was the complainant's duty "to keep informed," and if there appears to be a sufficiently serious risk of a deficiency, "to ask the Court to bring to an end the business it undertook and was conducting on complainant's petition."

It is a little difficult for us to understand what the learned Court thinks could have been done under such circumstances. The complainant could not be forced to receive the property and run it, nor would it have been proper to make such a disposition. The defendant was insolvent. The Court could hardly let go of the property prior to a sale. Meanwhile a competent and careful Receiver is the best judge of the propriety of spending money on it, and the person most obviously called upon to advise the Court whether to treat the property as a going concern or shut down work and thus reduce expenses to a minimum. Neither party can give any orders to the Receiver or in any way control his actions. He does not in any proper sense of the word "serve" them, or either of them. He is the bailiff of the Court, and during the pendency of the suit the Court is in adverse possession.

Judge MORROW, in the light afforded by the final sale of the property, says that there should have been provision made when the suit was commenced for the payment of any deficiency. The learned Circuit Court of Appeals say that they cannot see why, if the Court could at the beginning "compel the complainant to pay into court sufficient money to cover the expense of the receivership or to give security for such payment," it has "not precisely the same power to adjudge upon the settlement of the Receiver's account that the complainant make good any deficiency in the matter of such expenses." This is a curious misapprehension of Judge MORROW's position. We had not supposed that any one would suggest that a court of equity has general power to compel a complainant to pay or secure, either at the beginning of the suit or at the end of it, whatever expenses the Court in its

discretion might authorize its bailiff to incur. What was meant was that the Court should have refused to appoint a receiver, or refused to permit the property to be maintained in an expensive way, without prior indemnity by the complainant. *This would have given the complainant an option.* It would doubtless have led to independent investigation by the complainant, instead of reliance upon the wisdom of the Receiver and of the Court.

The learned Circuit Court of Appeals evidently considers that this is a case where one of two innocent parties must suffer because somebody did not have foresight enough to see that the property was not of sufficient value to warrant an expensive receivership, and comes to the conclusion that the suffering must be cast upon the absent trust company rather than upon the Receiver, notwithstanding that the latter was on the ground and charged with the duty of knowing all about the property.

It is submitted that there are two complete answers to this suggestion: First, that there is no principle in the law of agency or elsewhere upon which such a liability can be imputed to a complainant, whether the complainant or the Receiver may have been the party more responsible morally for the loss; and second, that the Receiver and his counsel, so far as their own compensation is concerned, and the recipients of certificates and time checks, so far as their compensation is concerned, are persons who must be presumed to have understood the risk which they were taking and to have secured payment for that risk. The situation is well described in the Brief of the late Wheeler H. Peckham of the New York Bar, filed in support of the first application for the writ of *certiorari* in this case (see RECORD, No. 557, October Term, 1902).

> "Without any express promise to assume this personal liability; without the existence of any facts from which such promise can be implied; with a judgment absolutely in plaintiff's favor; without the imposition of any condition upon which relief is granted; without any option ever having been offered to assume or decline any such liability, the Court below has imposed upon the complainant a personal liability for indebtedness and compensation of the Receiver.
>
> "It, too, has done this when the proceeds of sale

were sufficient to pay compensation to the Receiver and proved insufficient only because applied in priority to the payment of debts for which the Receiver was *not* personally liable."

Nature of Receiver's Certificates.

We take up first the Receiver's certificates, because they were given priority by the decree confirming the foreclosure sale (p. 112), and because the considerations which apply to them are largely applicable also to the other claims. For various different reasons we submit that the decree charging complainant personally with the deficit upon these certificates is erroneous.

The record shows that certain of the certificates were issued under the authority of the court and that careful provision was made as to the source from which they were to be paid, viz.: "out of the proceeds of sale of said property next after the costs of suit and sale" (pp. 35, 40).

No mention was made of any personal liability on the part of anybody.

The other certificates, issued without prior authority for labor or materials, stand upon the same basis as the Receiver's personal advances and his time checks. That they were regarded as investments involving great risk is confirmed by the fact that they bore interest at the high rate of ten per cent. in spite of the well-known financial standing of the Atlantic Trust Company.

The status of this sort of securities has often been before the Courts.

In Mercantile Trust Co. vs. Ry. Co., 58 Fed. Rep., 6, 15, the Court (TAFT, J.) said:

> "It is well established in the federal courts by numerous decisions of the Supreme Court of the United States that a court of equity, which, in foreclosure or other suits, has taken into its custody railroad property, may authorize its receivers to borrow money for the preservation, maintenance or necessary betterment

of the road, and may, by its order, *make the loans thus incurred a paramount lien on the income and corpus.*

" Wallace vs. Loomis, 97 U. S., 146.
" Union Trust Co. vs. Illinois M. Ry. Co., 117 U. S., 434.

" *The Court does not act as the agent for the parties in the sense that it creates the lien by contract of the parties with the lenders,* but, by virtue of its custody of the property and its jurisdiction of the parties, it pledges its own faith to the lender that it will enforce such *a lien against the property and the parties as a condition* of its releasing the property and of its enforcing any equities in favor of those who invoke its assistance. Now, it may enforce the lien in one of two ways: it may directly order out of the proceeds of sale the prior payment of the loans, or it may impose a continuing lien on the property by providing in its decree for sale that the purchaser shall take it subject to such a lien. * * *

" But the Court may order the sale of the property free of all liens, in which case the purchaser takes a title freed from the burden as well of Receiver's loans as of mortgage debts, *and the pledge of the Court that the Receiver's debts shall constitute a paramount lien can only be fulfilled by the Court in its distribution of the proceeds of sale.*"

In the first case in this Court on the subject, in 1854, Mr. Justice WAYNE said that the Receiver "is an indifferent person between parties," "an officer of the court"; that it "is the court itself which has the care of the property in dispute. The receiver is but the creature of the court" (*Booth vs. Clark*, 17 How., 322, 331). "He is not appointed for the benefit of either of the parties, but of all concerned" (*Davis vs. Gray*, 16 Wall., 203, 218). In the familiar case of a railroad receivership, as has been so often held in connection with receivers' certificates and with questions of priorities, "all concerned" include the public as well as the parties; and an irrigation company like the mortgagor in the present case is also a *quasi* public corporation (*Fallbrook Irrigation District vs.*

Bradley, 164 U. S., 112), so that the Court cannot be considered as having been operating this property for the benefit alone of the complainant, defendant and intervenors. *Non constat* but that had these parties all desired the preservation of the work to be abandoned the Court might have considered it in the public interest to disregard their wishes.

This Court has always maintained the position that a Receiver is an agent of the Court and derives no authority from the act of the parties at whose suggestion or by whose consent he is appointed (*Chicago Union Bank vs. Kansas City Bank*, 136 U. S., 223, 236; *Quincy, Missouri & Pacific R. R. Co. vs. Humphreys*, 145 U. S., 82, 97).

The lower Federal Courts have maintained the same doctrines (*Texas & St. Louis Ry. Co. vs. Rust*, 17 Fed. Rep., 275, 282; *Central Trust Co. vs. Wabash, St. Louis & Pacific Railway Co.*, 23 Fed. Rep., 863; *New York, P. & O. Ry. Co. vs. New York, L. E. & W. Ry. Co.*, 58 Fed. Rep., 268, 278). Thus in the Wabash case, where the receivers had been originally appointed upon the petition of the railway company, and the mortgagees afterwards applied for their reappointment as receivers in the foreclosure suits, Mr. Justice BREWER, then Circuit Judge, said (23 Fed. Rep., at p. 868), in overruling the application :

> "As we look upon it, the receivers are not receivers for either party. They are simply the hand of the court. In the process of the litigation the court has taken possession of the property, and holds it neither for the mortgagor nor the mortgagee, and it matters not, for the ultimate determination of the suit, at whose instance the receivers were appointed. They act for neither party. They represent neither party. They stand here simply as the hand of the court, holding the property for disposition at the end of the litigation, for the benefit of all. So I cannot see what can be gained as a legal proposition by a new order of appointment extending the receivership, as counsel say, to the trust company, the mortgagee."

The Receiver, thus being the agent of the Court and not the agent of either party, there is no legal principle upon which his contract may be treated as the contract of either party. This obvious fact has been often noticed in various ways. Thus, in *Turner vs. Peoria & Springfield R. R. Co.*, 95 Ill., 134, 145–6, decided in 1880, where the question raised was whether Receivers' certificates were negotiable, the Court held them non-negotiable upon the following reasoning :

> " Whether, in any event, they are payable in full depends upon the question whether the fund under the control of the court is sufficient for that purpose. That fact cannot be known except upon inquiry into the amount of such certificates issued by the officer authorized to act, and as to the value of the fund to be administered."

This case is referred to in all the text-books as authoritative. It was followed in 1883, in *McCurdy vs. Bowes*, 88 Ind., 583, 584–5, where the Court said that such a certificate " is the mere acknowledgment that a debt is due the payee, payable out of a specific fund."

Mr. Beach says, as to Receivers' certificates, that " there is no one personally liable for their payment " (*Beach on Receivers*, § 416). Mr. Smith says that such a certificate " is payable solely from the funds of the receivership, and that there is no responsible principal back of them to be made liable in case of default " (*Smith on Receivers*, § 287). Mr. High's statement is to the same effect (*High on Receivers*, § 398*c* & *e*).

In England, where Receivers' certificates do not seem to be used, the Receivers are personably liable unless special arrangements are made to the contrary. They are indemnified out of the fund, but the idea that the parties applying for Receivers are personally liable upon any theory seems never to have suggested itself (*Kerr on Receivers* [London edn., 1900], pp. 195, 208 ; *Burt vs. Bull*, L. R. 1895, 1 Q. B., 276, 279, 280, 282, 284).

Judge CALDWELL, of the Eighth Judicial Circuit, who had had wide experience in these matters, delivered an address on

"Railroad Receiverships in the Federal Courts," which was reprinted in the "American Law Review" in 1896, and has had wide circulation and citation, especially in the Western States. Speaking of the Receiver, he says positively that "neither party is responsible for his contracts" (30 American Law Review, 162).

"*The Pledged Faith of the Court.*"

Much stress was laid below upon the fact that the "faith of the Court had been pledged" to the Receiver and his creditors, and that it is the duty of the Court to see that the pledge is redeemed.

The only pledge that the Court made, or could lawfully make, was that the fund in Court would be impressed with a *paramount lien* in favor of the Receiver's creditors, and that it would enforce such *lien* against the property and parties as a condition of releasing the property.

See opinion Judge TAFT, 58 Fed. Rep., p. 15 *supra.*

> "The fund in the Receiver's hands is alone bound for their redemption, and their payment can be compelled only by an application to the Court by whose authority they were issued."
>
> *Beach on Receivers*, § 416.

> "The holders of these certificates must see to it that in the order distributing the purchase money, the proper provision is made for their redemption, because if once the property is sold, and the Court makes a final decree without providing for the payment of the certificates, there is in some sort an end of the matter. The receiver cannot then be sued; the court has no longer either the suit or the property under its control and is powerless to compel payment of such obligations."
>
> Beach, § 418.
>
> Alderson, § 344.

> "The certificates may not follow the property out of the court. But they constitutes a charge upon it in the particular cause enforceable in this court, and must be

satisfied or provided for before the property or the proceeds of it after the sale shall pass out of its control. The certificates are not debts of the company, but of the receivers, *backed by the pledged faith of the Court that the property on the proceeds of which they are charged, is in its possession, subject to be, and that it will be disposed of by it for the payment of them.*"

Meyer vs. Johnston, 53 Ala., 237, 348, 349.

"The most that can be predicated of them is that they are evidence in the hands of the holder that he is entitled to receive from the fund under the control of the Court that authorized its officer to issue them the amount specified, if the fund is sufficient to pay in full all holders of such certificates, or, if it is not sufficient, then only a *pro rata* share with other holders."

Turner vs. Peoria, &c., 95 Ill., 134, 145.

"A Court which appoints a receiver acquires by virtue of that appointment certain rights and assumes certain obligations, and the expenses which the Court creates in discharge of those obligations are *burdens necessarily on the property taken possession of*, and this irrespective of the question as to who may be the ultimate owner, or who may have the preferred lien, *or who may invoke the receivership.*"

Mr. Justice BREWER in *Kneeland vs. American Loan Co.*, 136 U. S., 89, 98.

Receiver's Time Checks, Advances, &c.

These stand in no better position than the Receiver's certificates. The time checks were mere certificates of indebtedness indicating the amount of time spent by each person furnishing labor and the amount due such persons (p. 89). Together with the amounts due on open accounts and the Receiver's own balance of account, they were placed upon a parity with the Receiver's certificates in the decree of foreclosure (pp. 88-90) to be paid next after the compensation of the Receiver and his counsel. But, as between themselves,

priority was given to the Receiver's certificates in the decree of confirmation (p. 112). They are in any event of no higher class than the certificates, and the same considerations above advanced apply also to them.

Among the time checks in the decree is classified a certain " Cert. of indebtedness for material " for $987.89 issued to the intervening co-complainant P. A. Buell & Co. (p. 90). By what seems to us a rather astonishing process of reasoning, this co-complainant, by the decree now appealed from, is to be allowed to recover the entire amount from the company into partnership with which he forced himself, after a litigation which was one of the causes of the unfortunate delays and disasters of this suit.

III. Costs of this kind, in absence of a statute, should in all cases be governed by equitable considerations, and upon the case now presented the equities are with the appellant.

(*a*) Upon the first appeal we presented the question as one of power. We contended, and do still contend, that under no circumstances could a complainant be forced (without prior agreement on his part to that effect) to pay a deficit of a receivership which was in all respects legal and in which the deficit had not been caused either by failure of title to the property taken by the receiver or by the existence of any prior lien thereon.

The question now arises whether the case made by this appellant, and which by his submission upon bill and answer the receiver has conceded that he is unable to controvert upon the facts, does or does not alter the situation.

(*b*) It will not be disputed that the question is to be decided upon equitable considerations. The contention of the receiver upon the prior appeal, which contention was sustained by the Court, was that the relief sought by him came within the equitable power of the Court, in its jurisdiction to fix the costs of the suit and decide how they should be

borne. His argument was founded upon the proposition that (*Chapman vs. Atlantic Trust Co.*, Appellant's Brief, p. 10)—

> "In such case the Court will be largely governed by the individual merits of the case, and exercise an equitable discretion in compelling the fund to bear the payment or those parties who in equity should pay the receiver's compensation in whole or in part, to do so as justice requires."

The Court below (119 Fed., 257) cited with approval the case of *Farmers' Natl. Bank vs. Backus*, 74 Minn. 264; S. C. 77, N. W. Rep. 142. That case held that as a general rule the party obtaining the appointment of the receiver is not liable for any deficit unless he has given a bond or contract as a condition of obtaining the receivership, but that there are exceptions; the exception then entertained being that the property had been wiped out by foreclosure of a prior lien, and that meanwhile (by suing upon the supersedeas bond given upon an appeal from the order appointing the receiver) plaintiff had come into possession of funds sufficient to wipe out the deficit.

Another case cited with approval by the Court upon the prior appeal was *Espuela Land Co. vs. Bindle*, 11 Tex. Civ. App. 262; 32 S. W. Rep. 582. In that case the receivership order had been held erroneous *ab initio* upon appeal. The Court nevertheless charged the fund with the expenses of the receivership in the first instance, leaving it open for defendant to apply for their imposition upon plaintiff as part of the taxable costs, saying:

> "that costs of this kind, in absence of a statute, should in all cases as between the parties be adjudged upon equitable principles."

In the *Ephraim case*, 129 Cal., 589, 592, which was the first case cited by the Court below in its opinion, and where upon demurrer it had appeared that the Receiver was entitled to be compensated by the complainant for leading him to take charge of a fund which belonged to a prior lienor and in which there was no equity, *the final decree was reversed for error in excluding evidence of an agreement by Receiver to look solely to the fund* (136 Cal., 646).

The question has since been under consideration by the Supreme Court of Alabama in *Wills Valley Co. vs. Galloway*, 139 Ala., 276, decided in January, 1904. There the receivership order had been reversed upon appeal, and the suit thereafter voluntarily dismissed by the complainants, jurisdiction being reserved to settle the Receiver's accounts. When the accounts came to be settled, the lower Court entered a decree holding the complainants personally liable for the balance due. The Supreme Court unanimously reversed it, saying that such liability is not absolute "without regard to the question whether they are equitably chargeable with it."

The general principles of equity in ruling upon questions of costs are set forth and the leading cases cited at 1 Foster's Fed. Prac. 3d ed. p. 718. Briefly stated, such costs are discretionary, taking into consideration the circumstances of the case and the situation and conduct of the parties. The best illustration for the present purpose, however, are to be found in the various cases bearing upon the disposition of the receiver's costs; the most apposite among which we have just cited.

That the equities are with the appellant is evident from the following facts of record:

First. The authority under which the certificates were issued and the careful provisions made for their payment out of the fund only fully appears.

Second. That the holders regarded the investment as one involving great risk, is confirmed by the fact that the certificates bore interest at 10 per cent., in spite of the high credit of the complainant, upon which no one relied.

Third. It stands admitted that at no time during the receivership or thereafter, until all right either of redemption or of appeal had expired, did any certificate holder, or the receiver, or anybody else, make a claim that the Atlantic Trust Company was responsible. Had such a claim been made, the company could and undoubtedly would have contested the legality of those receiver's certificates (about half of them in all) that were issued for labor and materials and without prior authority from the Court; and would have bid for the property, or redeemed it from the sale, instead of allowing the receiver and his counsel to get hold of it for their own benefit.

Fourth. It appears that the bulk of the certificates were

not regarded at the time as being issued for the benefit of the complainant, but as issued for the benefit of those other persons whom the receiver was bound equally to consider, namely, that portion of the public for whose benefit the canals and ditches and laterals and dams had been constructed and up to that time maintained. In such a case the receiver "is not appointed for the benefit of either of the parties, but of all concerned" (*Davis vs. Gray*, 16 Wall. 203, 218). *Non constat* but had the parties both asked an abandonment of the irrigation service *pendente lite*, the Court might have considered it in the public interest to disregard their wishes. Indeed, probably it would have refused any such request; and the Receiver is the bailiff of the Court, deriving no authority from the parties (24 Am. & Engl. Cycl. of Law, 2d Ed., 26; *Chicago Union Bank vs. Kansas City Bank*, 136 U. S., 223, 236; *Quincy, Missouri and Pacific R. R. Co vs. Humphreys*, 145 U. S., 82, 97; *Texas and St. Louis Ry. Co. vs. Rust*, 17 Fed. Rep., 275, 282; *Central Trust Co. vs. Wabash, St. Louis and Pacific Ry. Co.*, 23 Fed. Rep., 863, 868; *N. Y. P. and O. Ry. Co. vs. N. Y. L. E. and W. Ry. Co.*, 58 Fed. Rep., 268, 278); nor could the company, prior to the receivership, have abandoned the irrigation work without subjecting itself to suit on behalf of the farmers of the vicinage. (See Baldwin on American Railroad Law, 41, 491-2; *Union Pacific R. R. Co. vs. Hall*, 91 U. S., 343, 354.)

FIFTH. The Receiver cannot charge the complainant with amounts borrowed on his own responsibility after consulting only with the farmers of the vicinity, for the purpose of making repairs through an engineer selected neither by the Court, nor by himself, nor by the complainant, but by those very farmers; and the persons accepting such certificates knowing that the Court and the complainant had not been consulted, must conclusively be presumed to have relied entirely upon the result of the repairs for their ultimate reimbursement. As above stated, the Receiver of a corporation with a public interest, is charged with duties partly to the parties and partly to the public. In this case the public interest was so great that the public itself took a hand in it. The farmers of the vicinity who subscribed to the certificates, and made the necessary repairs, did so substantially in the character of special partners.

SIXTH. The act of the receiver in allowing the farmers to nominate the engineer was improper, at least to an extent which estops the receiver from seeking to charge any loss upon the parties to the suit. It was his duty to use his own discretion, guided by that of the Court. He cannot call upon the parties to fulfill his moral obligations when it appears that the persons to whom he improperly delegated his discretion used it unwisely. The delegation is justifiable only on the theory that he was permitting expenditures which were made by volunteers, on the understanding that they would be recovered only in case of success.

SEVENTH. It was the duty of the *receiver*, if there was any reason whatever to anticipate a possible deficit upon the sale, to apprise the Court and parties promptly of the danger; and he is estopped because he did not do so. If on the other hand there was no reason to anticipate such a result, the complainant has done nothing warranting the imposition of costs against it, but the deficit must be attributed to the act of God, in conjunction with the delays caused by the various interventions.

EIGHTH. As late as August, 1896, the receiver clearly gave the Court and parties to understand that the latter had not incurred any responsibility up to that date; and all but $2,500 of the receiver's certificates had been already put out, while those which were thereafter put out were authorized by the form of order previously adopted.

IV. The Receiver is estopped by his own laches from seeking to recover from complainant.

Reference has been made, in the statement of facts, to the action of the Receiver in delaying his present application for more than a year after the confirmation of the sale—after the six months' period for redemption fixed by the final decree (p. 96) had expired—and the time to appeal had likewise elapsed.

The trust company was thus kept in unsuspecting quiet until the time had expired in which it could either bid, redeem or appeal, and then, when there was no longer a possibility of

protecting itself and the bondholders, this inequitable judgment was entered against it.

If there had been a claim that it would be held responsible for this deficit caused by the Receiver's management of the property—following the advice sometimes of the farmers and sometimes of the Court, and acting sometimes apparently on his own responsibility alone—the trust company could have protected itself by bidding at the sale up to the full amount of the deficit. It would have had no more to pay out, even if it became the successful bidder. It would have had, on the other side of its account, the property to exploit or sell. *Non constat* but that the Receiver and his counsel would have bid against the trust company until the whole deficit would have been wiped out. Within the six months after the acceptance of the bid, if this liability had been claimed, the company could have redeemed.

In *Stumpf vs. Hallahan*, 101 App. Div., 383, the Appellate Division of the Supreme Court of New York for the First Department, in defeating an inequitable attempt on the part of a New Jersey mortgagee to enforce payment of a deficiency by suit on the bond in New York, say (O'BRIEN, J.):

> "She [mortgagee] neglected, however, to notify them or make them parties in the foreclosure action, and thus elected to make the land the primary fund, and by selling it, as she did, the defendants lost their rights to protect the security or do what they could to protect themselves against a deficiency. Had they brought suit in New Jersey, *within the six months as provided by statute, the defendants would have had the right to redeem.* Instead, however, of following that remedy, she waited nearly three years before proceeding upon the bond, *and then, the land having gone forever, the defendants were unable to protect themselves and could no longer redeem.*"

Moreover, the reservations in the final clause of the decree confirming the sale might have been appealed from, assuming the Court to have had jurisdiction to make them. The receiver, although he actually filed his petition within the year,

allowed for an appeal, failed to bring it to the notice of the Trust Company until the year had expired. Can any conduct be more inequitable?

The certificate and time check and open account people kept themselves in the background, letting the receiver represent them, and they are charged with the same laches and estoppel. The only difference between them is that the receiver and his counsel went one step further, and bid the property in for themselves under somebody else's name.

There is no particular length of time requisite upon which to found the defense of laches. The rules of equity upon this point have just been summed up by Mr. Justice BROWN in *Patterson vs. Hewitt*, 195 U. S., 309, 317–19:

> "In suits in equity the question is determined by the circumstances of each particular case. * * * The statute frequently works great practical injustice—the doctrine of laches, never. * * * Indeed, in some cases the diligence required is measured by months, rather than by years, [citing cases]. And in others a delay of two, three or four years has been held fatal [citing cases]."

This quotation substantially sustains the definition of laches contained in the Encyclopedia, which has been quoted and approved by the Supreme Courts of Illinois and Alabama (18 Am. & Eng. Ency. of Law, 2d ed., p. 97):

> "Laches is such neglect or omission to assert a right as taken in conjunction with lapse of time more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a Court of Equity."

Among recent cases where delays of one or two years were held sufficient, in addition to those cited by Mr. Justice BROWN, are *Hoyt vs. Latham*, 143 U. S., 553; *New York City vs. Pine*, 185 U. S., 93, 99; *Curtis vs. Lakin*, 94 Fed. Rep., 251; *McMurray vs. Noyes*, 72 N. Y., 523. In the *Pine* case, *supra*, the Supreme Court took the point itself, reversing the Courts below

As stated in *Townsend vs. Vanderwerker*, 160 U. S., 171–186—

> " The question of laches does not depend, as does the statute of limitation, upon the fact that certain definite time has elapsed since the cause of action accrued, but whether, under all the circumstance of the particular case, plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did."

It is not necessary that laches in order to constitute a defense must contain all the elements of a genuine estoppel. 2 Pomeroy's Eq. Jur., Sec. 816, says, as quoted in *Simmons vs. Burlington, etc., Ry. Co.*, 159 U. S., 278, 291—

> " Even when it does not work a true estoppel upon rights of property or of contract, it may operate in analogy to estoppel—may produce a quasi estoppel—upon the rights of remedy."

Moreover, the cases cited are cases where laches was held a defense *to an original bill.* The principle is much more freely applied when it comes up in relation to proceedings in a suit in equity or action at law. Upon interlocutory motions and application, and upon motions and applications after judgment or decree, no subject is more often discussed than the subject whether the applicant's delay has been sufficient to prevent the Court from considering the original merits of the proposition for which he is contending. If the other party has changed his position in any way, has done or omitted to do something which he would not have done or omitted to do had the application been made promptly—if a witness has died, or if the time has expired within which the other party might have taken some proceeding which would have improved his position—the application is very apt to be denied for laches alone.

Except as to this difference, that a much shorter period of delay is sufficient to constitute laches in relation to the making of an interlocutory application, or of an application after judgment, the test is the same as that which is applied when the

defense of laches is raised by demurrer, plea or answer to the original bill.

To the above citation of authorities and that made by Mr. Justice BROWN, we may also add the cases of *Galliher vs. Cadwell*, 145 U. S., 368, 372; *Abraham vs. Ordway*, 158 U. S., 416; *Matter of Lord*, 78 N. Y., 109.

Our contention here is that there was justification for the failure of the Trust Company to foresee the possible dangers of the receivership; and that since the complainant, the certificate holders, and all other parties (including, as on the presumption of fair conduct we ought perhaps to include, the receiver himself), likewise acted on the assumption that there was no personal liability, it would be grossly inequitable, even if the power existed, to charge costs now upon a theory which formed no part of the implied contract under which the expenses were run up.

V. In all cases where a complainant has been charged personally with the expenses of a receivership, he was held to be in some way in the wrong.

In the case at bar, the complainant has succeeded in his suit, the judgment was entirely in his favor, the appointment of the Receiver was in all respects regular, the *res* was in Court for distribution, all allegations of bad faith are controverted and disproved, there was no express contract or promise to pay the Receiver's expenses and none can be implied from the nature of the Receiver's appointment.

Under these circumstances we submit that there is no principle on which the complainant can without its consent be made liable to the Receiver.

The Atlantic Trust Company can not be regarded as negligent in assuming unquestioningly that it had no personal responsibility, in view of the fact that there had been no prior application of this kind, while so many cases had proceeded upon theories apparently inconsistent with such a ruling; and as to the Receiver's certificates in particular, in view of

the cases and text books which had held that they were only a lien upon the fund and without personal responsibility beyond them (*Turner vs. Peoria & Springfield R. R. Co.*, 95 Ill., 134, 145-6 ; *McCurdy vs. Bowes*, 88 Ind., 583, 584-5 ; *Burt vs. Bull*, L. R., 1895, 1 Q. B., 276, 279-80, 282, 284 ; Beach on Receivers, Sec. 416 ; Smith on Receivers, Sec. 287 ; High on Receivers, Sec. 398 *c & e ;* Kerr on Receivers [Lon. ed., 1900], p. 195, 208 ; 24 Am. & Eng. Cycl. of Law, 41 ; Judge CALDWELL on " Railroad Receiverships in the Federal Courts," 30 Am. L. Rev., 162). It is for this very reason that they are held non-negotiable (*Union Trust Co. vs. Chicago & Lake Huron Ry. Co.*, 7 Fed. Rep., 513, and cases cited).

The mere fact that the trust deed (p. 54, Article sixth), gave the trustee the right to take possession of the property in case of default and to sell it at public auction did not make it obligatory on it to do so. Article eighth (p. 56) provided :

> " Nothing herein shall be construed as limiting the right of the Trustee to apply to any competent Court for a decree of foreclosure and sale under this indenture, *or for the usual relief in such proceedings ; and the said Trustee, or its successor, may in its discretion, so proceed.*"

Some importance seems to have been attached by the Court below to this discretion, for Judge GILBERT refers to it in his opinion (Record, p. 170), in these words :

> " It brought the foreclosure suit at the request of stockholders [bondholders], it is true, but it was not bound to resort to the Court or to ask for the appointment of a receiver. The trust deed gave it the option to sell at public auction the entire property in case of default in the payment of interest."

In the light of subsequent experience it might possibly have been better for the trustee to have exercised its option to sell, but at the time when the application for a Receiver was made

> " matters were almost in condition of a riot ; the most intense feeling was existing on the part of a large num-

> ber of people against the management; threats of all kinds were made against the corporate defendant and against the property under its charge, and which came into my charge as receiver. * * * Very frequently when I have visited the works I have been met by angry and excited crowds threatening my own life and threatening to blow up the dam with dynamite and destroy the works."
>
> Receiver's Report of Aug. 10, 1897, p. 79.

If the Receiver, under the protection of the Court, encountered such obstacles, what would have been the result if the non resident trustee itself had attempted to take possession of the property? It was only the long arm of the Court which could protect the property under such conditions, and the resort to equitable powers of that Court was not only a proper exercise of the trustee's discretion, but was absolutely necessary to conserve what was then deemed by every one to be a valuable property, and upon which had been expended the large sum of $175,787.15 (see Trial Balance, Exhibit A, pp. 28–30).

Furthermore, the floating indebtedness was so large that the property would inevitably have been attached and disrupted.

No clearer case was ever presented for the appointment of a Receiver, and the good faith of the trustee in making the application cannot be questioned.

Examination of the authorities cited by the learned Circuit Court of Appeals in its first opinion (119 Fed. Rep., 257) show that none of them are in point. So far as they approach the subject at all, they may be divided into three classes (we add some also which were not cited by it): first, those which hold that when the *order appointing the receiver is illegal* and was improperly obtained by the plaintiff, it would be inequitable to charge the expense upon the property, and, therefore, it must be charged to the plaintiff, a familiar rule of obvious correctness (*Pittsfield Nat. Bank vs. Bayne*, 140 N. Y., 321, 330–1, per PECKHAM, J.; *French vs. Gifford*, 31 Iowa, 428; *McAurow vs. Martin*, 183 Ill., 467; *Link Belt Co. vs. Hughes*, 195 Ill., 413; *Beach vs. Macon*

Grocery Co., 11 Am. Bank. R., 104; *Couper vs. Shirley*, 75 Fed. Rep., 168); second, those which hold that when the receivership order was legal, but the plaintiff is finally defeated in the suit, the chancellor has power to charge the receivership expenses upon him as *part of the costs* (*Highley vs. Deane*, 168 Ill., 266; *City of St. Louis vs. St. Louis Gas Light Co.*, 87 Mo., 223; *Cutter vs. Pollock*, 7 N. Dak., 631), although this power can be exercised only when the plaintiff's action in commencing suit and obtaining a receiver involved an impropriety (*Ferguson vs. Dent*, 46 Fed. Rep., 88, 96–8; *Elk Fork Oil Co. vs. Foster*, 99 Fed. Rep., 495); and third, when there was no fund at all for the Receiver to take, so that his acts in taking possession of the property were in derogation of the rights of the lawful owner, whose rights could and should have been respected by the plaintiff. This last exception has had two different applications: first, to the case of a receivership in a suit against A, the property turning out to belong to B, who had no interest in the controversy (*Howe vs. Jones*, 66 Iowa, 156); and second, when the receivership is of an equity of redemption, the property is not sufficient to take care of the prior mortgage, and the plaintiff has failed to obtain the consent of the mortgagee to the receivership (*Tome vs. King*, 64 Md., 166; *Ephraim vs. Pacific Bank*, 129 Cal., 589; *Knickerbocker vs. McKindley Coal Co.*, 67 Ill. App., 291), and even then, if the equities favor the complainant, it will alter the rule (*Ephraim Case* [2d appeal], 136 Cal., 646; *Wills Valley Co. vs. Galloway*, 139 Ala., 276).

The authorities are well summed up in Mr. Peckham's brief, to which we have before referred and from which we again quote:

> "It is clear in this case that there is no express contract by the complainant to pay this receiver.
>
> "How can a contract or promise to pay be implied when the sole duty and obligation of the receiver are to take care of the property for the benefit of the complainant or others entitled, and when to encumber it even at all would be a breach of trust unless pursuant to an order of the Court?

"It is, however, suggested that there are many cases holding the parties liable to the receiver.

"We agree.

"In a certain way it may be said that all parties are liable to the receiver.

"A defendant who fails always has to pay the receiver; because the receiver's compensation is taken out of the property and the balance only applied to the payment of the debt, and the surplus is less or the deficiency greater.

"A complainant who has failed to establish his claim to the *res*, whether because of matter in abatement or in bar, may be liable to the defendant for the receiver's fees which the defendant has had to pay to the receiver in possession in order to get back his property.

"He *may* even be liable directly to the receiver if the judgment be that the plaintiff had no right in the *res* and it has been taken from the receiver by one having paramount right and from whom the receiver had no right to retain the property for compensation or fees.

"*Pittsfield Bank vs. Bayne*, 140 N. Y., 321, and *Howe vs. Jones*, 66 Iowa, 156, are illustrations.

"These and similar cases are but the reverse of the liability of defendant in that payment of the costs of receivership diminishes the amount of surplus or increases the amount of the deficiency for which the debtor is liable.

"In these cases judgment was rendered *against* the plaintiff. It was adjudged that the plaintiff had no lien on or interest in the property which plaintiff had caused to be seized, and that as the seizure was wrongful and the receiver could not deduct his fees before turning over the property, the plaintiff might be liable to pay them *because the plaintiff had failed in his suit.*"

VI. The Circuit Court had no jurisdiction, after the final decree of foreclosure and sale, to make any new disposition of the costs of the suit, as by charging any portion personally upon the complainant.

It would of course have been within the power of the Court, in settling the terms of the final decree of foreclosure and sale, to reserve any or all questions not absolutely necessary to be adjudicated before the sale. This is often done. A familiar form is to be found in *Chamberlin vs. Peoria, D. & E. Ry. Co.*, 118 Fed. Rep., 32, 34, where the decree ended as follows :

> " All equities and rights of any parties not hereinbefore specifically adjudged, including the discharge of the receiver and the passing of his accounts, and all other questions of every kind and nature not hereby disposed of, are hereby reserved for future adjudication, the settlement of the same being held not to be necessary for the purpose of this decree, and the Court reserves the right to make such further order at the foot of this decree as may seem just and proper, and jurisdiction in this Court is retained by this Court for the purpose of enforcing all the provisions of this decree."

Notwithstanding these very broad provisions, so different from those in the present case, the Court evidently regarded as *frivolous a contention that any jurisdiction not expressly reserved could survive ;* and therefore held that it had no jurisdiction to certify to the Supreme Court a question of jurisdiction after the expiration of the term at which the decree was rendered.

Much stress was laid by the Court of Appeals on the first appeal (119 Federal, 257, 267) that the Circuit Court had " by its decree in express terms *retained jurisdiction of the cause and of the parties* thereto for the purpose of settling the receiver's account and ordering paid the costs and expenses of the receivership."

That reservation was contained only in the order confirming the sale (p. 112) and not in the final decree.

In the final decree no reservation was made except a power to modify as to the upset or minimum price at the bidding, as to the manner of sale of the personal property and as to the withdrawal of certain personal property from the sale for purposes of compromise (p. 107). The subject of costs is one which is customarily and properly disposed of by the final decree of foreclosure and sale. The Circuit Court in the present case, upon motion of the solicitors for the Atlantic Trust Company, followed this practice, and left no provision as to costs undisposed of. It fixed the compensation of the counsel for the various parties and of the Receiver. It fixed the Receiver's fees. It provided how all of these sums should be paid, namely, "out of the proceeds of the sale hereinafter ordered" (p. 90). It fixed the compensation which the Commissioner should receive for making the sale (p. 96). It charged certain costs personally upon certain intervenors, and provided how they should be taxed and how they should be collected (p. 107).

We submit that the decree of foreclosure and sale is the final decree in the cause. In fact, the confirmation of a foreclosure sale is very commonly effected by an order instead of a decree, and it is not seldom omitted altogether.

The cases which established the appealability of rulings made upon confirmation of a sale were made upon appeals from orders, not from decrees (*Blossom vs. Milwaukee, &c., R. R. Co.*, 1 Wall., 655; *Orchard vs. Hughes. Id.*, 657). Probably the most usual practice in the United States Courts would be to entitle such a ruling as an order, rather than as a decree. The finality of the decree of foreclosure and sale was first established in *Ray vs. Law*, 3 Cranch, 179, upon motion to dismiss an appeal therefrom. In *Whiting vs. Bank of the United States*, 13 Pet., 6, the filing of a bill of review brought the question up in another form. If the decree of foreclosure was the final decree the bill was too late, having been filed more than five years thereafter. The Court so held. STORY, J., saying as to the objection (p. 15):

> "That depends upon this; whether the decree of foreclosure and sale is to be considered as *the final decree* in the sense of a court of equity, and the pro-

> ceedings on that decree *a mere mode of enforcing* the rights of the creditor, and for the benefit of the debtor; or whether the decree is to be deemed final only after the return and confirmation of the sale by a decretal order of the Court. We are of opinion, that the former is the true view of the matter. * * * Indeed, the ulterior proceedings are *but a mode of executing the original decree*, like the award of an execution at law."

In *Forgay vs. Conrad*, 6 How., 201, 203-4, this opinion is referred to by Chief Justice TANEY as showing "that the decree of foreclosure and sale was final upon the merits, and the ulterior proceedings but a mode of executing the original decree."

A decree is final which settles all the rights of the parties and leaves nothing to be done but to make the sale and pay out the proceeds.

> *Grant vs. Phœnix Ins. Co.*, 106 U. S., 429, 431.
> *R. R. Co. vs. Express Co.*, 108 U. S., 24.
> *M., K. & T. Ry. Co. vs. Dinsmore*, 108 U. S., 30.

It will be noticed that this classification fails to include the subject of costs. These are not strictly part of the "merits," nor on the other hand do they relate to the enforcement. We believe it to be a universal rule, however, to dispose of the costs in the final decree of foreclosure and sale as was done by the Court in the present case; and if the subject is taken up and disposed of, and no right to modification reserved, it cannot be regarded as a proper incident thereafter to a mere enforcing order. It is submitted that every party to a final decree of foreclosure and sale has an absolute right to absent himself altogether from all future proceedings, with a sense of security as against any claims not already adjudicated, *excepting only if he be served with notice of an application to open or review that decree.*

The decree of confirmation of sale in this cause in its very first line refers to the "*final* decree of foreclosure and sale" (p. 108). There is no recital that the complainant appeared. There was no reason why it should appear in the absence of any notice of claim against itself. Nobody but the Receiver was interested in having his title to the property confirmed.

The settlement of the Receiver's final account and his discharge were routine matters, purely incidental to the final judgment, in which the complainant has no interest, in view of the result of the sale. There were really no accounts to settle—as the clerk had made complete distribution of the fund (p. 113). The Receiver's discharge would be granted as a matter of course. To remand the case to the Circuit Court for that purpose would be an idle formality. There was but one real controversy before the Court, and that was the simple question as to whether the Court had power, after final judgment, to enter judgment against the complainant in the original cause. The Circuit Court of Appeals held that such power existed. Judge Monnow and the Supreme Court of Oregon held that no such power existed.

The decision of this Court is awaited with grave interest by all corporations and individuals whose business it is to act as mortgage trustees for bondholders. It will affect numbers of foreclosure suits pending in many courts throughout the country. The complainants in the more important cases are usually trust companies possessed of large means and high credit. If the Circuit Court of Appeals has, as we believe, misinterpreted the law, these trustees should be advised of it by the adjudication of this Court, and relieved of an almost limitless liability, because of the mere appointment of a Receiver over whose actions they have no control.

It is respectfully submitted that upon the view of the law heretofore held by everybody and questioned by nobody, immense numbers of business transactions, great and small, have been based. Receivers have had to pay high prices because they could give no security except that of the fund in court. For the same reason their certificates have carried very high interest, or been sold at great discount, or both. If these trust companies are now held to have been responsible for any deficiency, it will mean that, by a universal mistake of the law, properties in the hands of the Courts have been unnecessarily depleted, and it will mean that persons who have exacted high interest and large discounts from Receivers, because it was supposed by both the Receivers and themselves that there was no personal liability, may have it in their power to now obtain unexpected profits by collection of their claims out of

the unfortunate plaintiffs. Had it not been regarded as established law that there was no personal responsibility on any party's part for the expenses of a receivership, many great properties would have been at once sacrificed, which, by means of Receivers' certificates, sold at a discount, have been carried through hard times and put on a sound basis again under direction of the Courts.

VII. The judgment of the Circuit Court should be reversed.

October, 1907.

STANLEY W. DEXTER,
EDWARD B. WHITNEY,
Of Counsel for Atlantic Trust Company,
Petitioner.

FILED
OCT 6
JAMES H. [illegible]

No. 109.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1906.

THE ATLANTIC TRUST COMPANY,
Petitioner,

vs.

EDGAR C. CHAPMAN, Receiver of the Woodbridge Canal and Irrigation Company, et al.,
Respondent.

REPLY OF RESPONDENT CHAPMAN IN PERSON TO PETITION FOR WRIT OF CERTIORARI.

EDGAR C. CHAPMAN,
Room 16, Ferry Building, San Francisco, Cal.
Respondent in Person.

Fernau Publishing Co.

No.

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Respondent.

REPLY OF RESPONDENT CHAPMAN IN PERSON TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF FACTS.

This Court is asked to review the proceedings of the U. S. Circuit Court of Appeals, 9th Circuit, wherein the order of the Circuit Court was affirmed adjudging the receiver of the Woodbridge Canal and Irrigation Co. entitled to be paid the expenses

incurred in the management of the property of the Canal Company while *in custodia legis.*

The order above referred to was made after the entry of the decree of foreclosure and sale, and an order of confirmation of sale, in a certain foreclosure proceeding hereinafter set forth; the Court reserving jurisdiction in and by said last named order to provide for the payment of such expenses.

Nearly twelve years ago the Atlantic Trust Company of New York commenced a foreclosure suit in the United States Circuit Court in and for the Northern District of California. The defendant was the Woodbridge Canal & Irrigation Company, a California corporation, organized and doing business under the laws of that State.

DEED OF TRUST.

The instrument sued on was a deed of trust, by the terms of which, among other things, it was provided, "that in case of default in the payment of the "semi-annual interest on the bonds of the Canal "Company for a space of six months, the Trust "Company was expressly authorized to sell the "entire property of the Company on two months' "notice, by advertising in one or more newspapers "of general circulation" (Printed Record, 28 and 106).

It was also provided "that nothing herein shall be "construed as limiting the right of the Trustee "(Atlantic Trust Company) to apply to any com-

"petent court for a decree of foreclosure and sale "under this indenture" (Printed Rec. 30). It was further provided, "that in case it shall be re- "quired by the holders of bonds secured by this "indenture to enforce any of their rights hereby "secured, the said trustee shall not be required to "incur any expense or liability in connection there- "with until satisfactorily indemnified therefor" (Printed Rec., 31).

ORDER APPOINTING RECEIVER.

On motion of the Trust Company, to which the defendant consented, a receiver was appointed by the Court at the time of commencing said suit, whose duty it was, under the order appointing him, "to "continue the operation of the main and branch "canals of the said Woodbridge Canal & Irrigation "Company in the usual and ordinary course, as the "same is now operated, * * * keeping the "premises and property, both real and personal, in "good condition and repair, * * * and pay for "all such needful labor and supplies and materials "as may seem to him to be necessary and proper "in the exercise of his sound discretion, for the "carrying on and keeping in repair said canals, "with leave to apply to the Court from time to time "as he may be advised for instructions in the prem- "ises" (Printed Rec., 39).

COMPLIANCE OF RECEIVER WITH ORDERS OF COURT.

The receiver complied with the order of his appointment in all respects. He reported to the Court from time to time concerning every step connected with the operation, maintenance and repair of the canal. He informed the Court and all parties in interest of the necessity of raising money if the order of his appointment was to be carried out. This resulted in orders of Court authorizing him to borrow money and issue certificates therefor (Printed Record, 70-73).

No objection was made to the manner of the receiver's management in any respect by the parties to the suit or by anyone; not a word was said about the impropriety, now enlarged upon by the petitioner herein (see petition, page 5), of the farmers nominating the old engineer of the Company, W. C. Pidge, to take charge of repairing the dam of the Company and the receiver's appointment of him until years after the foreclosure and sale of the property; and not until the receiver filed his petition for the order, asking the Court to compel the Trust Company to provide for the expenses of the receivership now unpaid and outstanding.

ATTITUDE OF TRUST COMPANY TOWARD THE COURT.

The Trust Company had notice of all of the proceedings connected with the receiver's management, and acquiesced therein. (Reports of Receiver, Printed Record, 42, 69, 143, 225.)

The appointment of the receiver was made during the financial panic that commenced in " '93", and swept the United States; and hence it was impossible to raise money or to dispose of receiver's certificates issued by the Court's order to any banking institution or money lender in the State of California or elsewhere (Printed Rec., 70-73).

DERELICTION OF TRUST COMPANY.

The Trust Company was aware of the efforts made by the receiver to raise money on receiver certificates, yet it made no effort to assist him in any way. It could have done so. It had come into court asking to have a large deed of trust foreclosed and to have its solicitors paid $10,000 for their services in that behalf, and had thereby impliedly represented to the Court that the property of the Canal Company was of great value (Printed Rec., 90), and yet it would not volunteer to advance one cent of costs, although at that time and ever since, as appears by the answer, it has been a "*corporation enjoying very "high credit in the commercial community of the "United States*" (Printed Rec., 280).

These facts, taken in connection with the proposition that, at the time of the foreclosure sale, the Trust Company made no effort to prevent a sacrifice of the property, furnish the reasons why the Company should pay the balance of the Court's expenses —especially so, as there was no necessity of asking the Court to assume the care and management of

the property under section 6 of the deed of trust—said section providing for a sale of the property at public auction on 60 days' notice by publication in one or more newspapers (Printed Record, 105).

Therefore, unless the Trust Company intended to deliberately impose upon the Court, it was its duty to move to terminate the receivership or else agree to provide for the payment of the expenses thereof during the progress of the litigation or at the end thereof. The Court could not determine in advance what the Trust Company might do at the foreclosure sale. If the property were of great value, the Court might naturally conclude that the Trust Company would finally come to the rescue and save the property from being sacrificed, it having the ability so to do; and thus aid the Court which had pledged its faith to the payment of the expenses of managing the property brought into it by the complainant. And it here may be proper to refer to the opinion of Judge Ross in Chapman v. Atlantic Trust Company, when the sufficiency of the receiver's petition was being tested on demurrer:

> "the complainant can inform himself of the probable outcome of the property, and, if he be not willing to give the guaranty he will not secure the appointment of a receiver in the one instance, or his continuance in office in the other. But why should he not be required to inform himself, also, when no such condition is imposed by the Court? Precisely the same opportunity on complainant's part, and precisely the same duty to inform himself in that respect, exists in the absence of the requirement of the

guaranty mentioned. The complainant, whose lien upon the property it is sought to foreclose, in the nature of things, must and should be held to have much better information regarding the value of the property and its probable outcome than the Court. Indeed, it is not easy to see how the Court can be properly expected to know anything about it. The appointment of a receiver, if made at all, is usually made at the request of the complainant,—occasionally, as in the case at bar, with the consent of the defendant. *If the complainant was not willing to pay the expenses of the receivership it asked for, in the event of the insufficiency of the property to do so, it should not have asked the Court to make the appointment, incur the liabilities, and pledge its faith to their payment.* It was the duty of the complainant to keep informed in respect to the progress of the receivership, the property, and its probable outcome, and, whenever it became unwilling to further stand good for any deficiency, to ask the Court to bring to an end the business it undertook and was conducting on complainant's petition. We are therefore of the opinion that *the complainant is liable for the deficiency shown by the decrees already rendered in the cause, and for such further deficiency as may be properly ascertained;* and such is the decided weight of authority". (119 Fed. Reporter, page 269.)

The conduct of the Company is attempted to be explained by its counsel. They say that the Trust Company had no idea that it was liable for the payment of the Court's expenses. It assumed the law to be that the Court had no power to protect itself in the event it had been misled at the instance of complainant as to the value of the property brought

by it into court to be operated, managed and administered.

That we are not mistaken as to the attitude of the Trust Company in this behalf appears from the eleventh paragraph of the Company's answer, in which the following is set forth, "and this com-" plainant further shows that it is a corporation " enjoying *very high credit in the commercial com-" munity of the United States, and that, had it been " stated or believed by the persons taking said re-" ceiver certificates or any of them, that this com-" plainant was personally liable upon them, either " primarily or secondarily, they would have been " rapidly subscribed to at a low rate of interest in-" stead of being put out with great difficulty at an " interest of 10% per annum*". (Printed Record, 280.)

This reasoning does not commend itself to us, for it is an admission of a violation of duty on its part to the Court. Especially so as it appears by the terms of the deed of trust and the averments of its answer that the Trust Company could have been fully indemnified for all the expenses incurred by it in these proceedings (Printed Rec., 31 and 109).

THE PETITION FOR THE WRIT OF CERTIORARI SHOULD BE DENIED

Having set forth the situation and relation of the Trust Company to the Court and its receiver, we come now to the consideration of the Trust Com-

pany's application to this Court for a writ of certiorari.

We contend that the writ should not be given for the following reasons:

1st. THIS COURT IS WITHOUT JURISDICTION TO GRANT THE RELIEF ASKED FOR.

By the act of Congress of March 3, 1891, it is, among other things, provided

> "That Circuit Courts of Appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error the final decision in District Courts and in the existing Circuit Courts in all cases than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the Circuit Court of Appeals *shall be final* in all cases in which the *jurisdiction is dependent entirely* upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States." (26 U. S. Stats. 828, 826, Sec. 6.)

See also Rouse v. Letcher, 156 U. S. 47; Gregory v. Van Ee, 160 U. S. 643; Carey v. Railway Co., 161 U. S. 115; Rouse v. Hornsby, 161 U. S. 590.

The Circuit Court had jurisdiction over the subject matter contained in the bill of complaint and all the parties thereto, and, having pleaded in its bill of complaint the fact of diverse citizenship of the parties to the litigation, upon which the jurisdiction of the Circuit was made solely to depend, we

hold that the determination of the appeal to the Circuit Court of Appeals should end the litigation.

It is a familiar rule of equity that jurisdiction once acquired is retained by the Court until justice shall be meted out to all parties. Therefore, the decision of the Circuit Court of Appeals in affirming the judgment of the Circuit Court was, and is, under the act of Congress *final* and no appeal therefrom or writ of certiorari lies to this Court.

The claim of counsel that the jurisdiction which it admits the Circuit Court had, to enter the decree of foreclosure and sale, was lost by it because the decree contained no provision for any possible deficiency, is untenable; for, obviously the Court had the undoubted right to confirm the sale *after the entry of the decree of foreclosure or reject it, or to impose conditions as to the expenses that had been incurred by the Court up to that time; and this implies the retention of jurisdiction.* That this is so, is evident from the fact that until the sale was actually made the Court could not know that there would be a deficiency. The Court is not bound to provide for something that may never occur,—"sufficient unto the day is the evil thereof".

Jurisdiction to enter a decree confirming the sale having been by necessary implication retained, it follows that the Court, then being in possession of additional knowledge, had the right to, and it did expressly retain, jurisdiction of the case in the following language: "and it is further ordered that

" jurisdiction of this cause and the parties thereto " be and the same is hereby retained by the court " until redemption is made or title deeds have " passed as herein provided, and until the coming " in of the reports of the said clerk and receiver " herein provided for, and to the final action of the " court thereon, and the final payment of the balance " of the costs and expenses of this court and its " officers, and of the advances made and the indebt- " edness incurred by said reciver which have been " or may be allowed by the court, in the management " and care of the property placed in his charge and " until the further and final order of the court in " that behalf". (Printed Record, 222.)

The Trust Company is, therefore, concluded by the decision of the Circuit Court of Appeals from proceeding further in this matter, for the decision of said Court was, and is, final.

2nd. THE TRUST COMPANY IS ALSO CONCLUDED BY THE DENIAL OF ITS FORMER PETITION FOR A WRIT OF CERTIORARI FILED HEREIN.

Upon the former hearing before this Court it was argued that the Circuit Court did not have jurisdiction to grant the relief demanded by the receiver,—that the order of the Circuit Court entertaining the report of the receiver was not an appealable order because made after final judgment. The receiver argued that, as he was not affected by it, he could not appeal therefrom—that only the parties to that proceeding were affected by it.

The same proposition and none other is again presented to this Court. The action of this Court in denying the former petition of the Trust Company is res adjudicata. (Cyclopedia of Law & Procedure, vol. 6, p. 747.)

Counsel claims that the case now brought here by the Trust Company is different. This is not so. True, the answer of the Trust Company was not before the Court on the former hearing, but, as it does not deny any of the material facts of the receiver's petition, it admits all the averments of the receiver's petition that are well pleaded and that are material (Printed Record, 255). See also recent decision of Circuit Court of Appeals in Atlantic Trust Company v. Chapman in the Printed Record.

The Circuit Court entered a decree against the Trust Company under stipulation of counsel as upon Bill and answer. The Receiver filed no replication. It was not necessary to do so. The answer raised no issue. The *expenses of the receivership set forth in the petition were all admitted by the answer* The answer raised no issue as to the amount, nature, or character of such expenses, nor that they were not legally incurred. It merely denied legal liability on the ground of want of jurisdiction of the Circuit Court to entertain the petition of the Receiver in that behalf. The *demurrer theretofore filed by the Trust Company had likewise denied legal liability on the same* grounds as are set forth in the Trust Company's answer but its contention in that behalf

was not sustained either by the Circuit Court of Appeals; or by this Court, on the former application of the Trust Company for a writ of certiorari.

This Court having heretofore considered the question of the right of the Circuit Court to enter a decree in accordance with the Receiver's petition and having resolved that question in favor of the Receiver and against the Trust Company it follows that this Court will not now reconsider the same,—in other words *this Court having concluded that the action of the Circuit Court of Appeals was final* under the Act of March 3, 1891, will not entertain the petition now before it for a writ of certiorari.

ARGUMENT OF COUNSEL.

The argument of Counsel for the Trust Company seems to be an attempt to convince this Court that the Circuit Court decided the case incorrectly on the merits. That is not a proper subject for discussion here. The question here is one of law—the *right of the Circuit Court to grant the petition of the Receiver,* it having expressly retained jurisdiction of the case for that purpose.

While we do not think it proper to discuss the merits of the decree of the Circuit Court we will say in passing that there is nothing in the record to disclose any objection to any of the acts of the Receiver made at the time of their occurrence but all of his expenses are admitted to have been properly made;

the answer of the Trust Company avering that "all "of said items were adjudicated by this Court in "the final decree of foreclosure entered herein" (Printed Rec. 260).

COUNSEL'S FIVE POINTS.

We have examined the five points of counsel's argument contained in the petition, but as they do not show that the Circuit Court was without jurisdiction to entertain the petition of the Receiver we do no deem it advisable to consider them at length.

First: The Trust Company's first point is "*that the conflict in opinion between the high appellate tribunals which have passed upon the above question makes it one eminently proper to be considered by this Court*" to which we reply that this Court will not issue the writ asked for and assume jurisdiction herein contrary to the Act of Congress merely because there may be a conflict of authority between two State Courts on one side, and the Circuit Court of Appeals on the other. It may be desirable to have uniformity of decisions between all of the courts of the land, but this Court would not be justified for that reason to nullify Section 6 of the Act of Mar. 3, 1891.

Second: "*The question is one of very great importance.*" As to the practical importance of this question we have only to say that the Congress of the United States has delegated to the Circuit

Court of Appeals exclusive power to decide such questions as are involved in cases of this character and in our opinion such courts are thoroughly competent to exercise it. If the Act of Congress is wrong in that respect it should be repealed, but while it is the law, this Court will not ignore it.

Third: "*The decision of the Circuit Court of Appeals in this case is inconsistent with the settled and fundamental laws of receiverships.*" To which we reply, the Supreme Court of Oregon says that the precise question has never been presented before of the right of a *railroad receiver* to be compensated (?) under such circumstances. The Court could find no decision in point on the subject; therefore, the settled and fundamental principles of the law of receivership ought not to be very badly shaken by the decision of the Circuit Court of Appeals even though it differed with the Oregon Court. The Circuit Court of Appeals was, of the opinion however, that there was a decided weight of authority in favor of the Receiver's contention, and that the reasoning of the Supreme Court of Oregon was not sound, and held that the *Circuit Court having pledged its faith* to the payment of expenses incurred by it in the management of the property placed in its charge, had the power to enter a decree (compelling reimbursement by complainant) *after the entry of the entry of the decree of foreclosure.* (Chapman v. Atlantic Trust Co., 119 Fed. Rep. 269.)

We have answered points Four and Five.

Having shown that the Circuit Court acquired jurisdiction of the parties to the foreclosure suit above referred to, and having shown that the jurisdiction so acquired was not lost upon the entry of the decree of foreclosure and sale nor until an appeal was taken from the order adjudging that the Receiver's petition be granted, and having shown that the *Circuit Court of Appeals had under the Act of March 3, 1891, absolute and final authority to affirm the decree of said Circuit Court,* and having shown that the same proposition and none other was disposed of by this Court upon the former application of petitioner it follows that the present petition of the Trust Company for the writ of certiorari asked for should be denied.

Respectfully submitted,

EDGAR C. CHAPMAN,
Room 10, Ferry Building, San Francisco, Cal.
Respondent in Person.

Office Supreme Court, U. S.
FILED
DEC 13 1907
JAMES H. McKENNEY,

No. 109

In the Supreme Court

OF THE

United States

OCTOBER TERM 1907.

THE ATLANTIC TRUST COMPANY,
Petitioner,

vs.

EDGAR C. CHAPMAN, Receiver of the Woodbridge Canal and Irrigation Company et al.,
Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Brief for Respondent Edgar C. Chapman, Receiver, Etc.

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PEIRAU PUBLISHING CO., S. F.

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A complainant having the option under a trust deed to sell at public auction, brings a foreclosure suit against an irrigation company (Record, p. 15).

A receiver is appointed upon the application of complainant (pp. 7 and 20).

The defendant defaults (p. 86). The receiver manages and operates the property for a period of three years before complainant applies for a decree of foreclosure and sale (p. 86).

He complies with all of the orders of the Court appointing him.

Reports to the Court from time to time concerning the condition of the property and its operation (pp. 22, 32, 73, 114).

Struggles with all the resources at his command to keep the property a "going concern" (pp. 32, 33, 36, 37, 38, 39).

The income derived from the property is insufficient to meet expenses (pp. 32, 33).

The receiver seeks financial assistance from the Court upon notice to complainant (pp. 32, 33, 34).

Is given permission to borrow money on receiver's certificates (pp. 34, 39).

Has great difficulty in floating them (pp. 74, 75).

He accounts fully to the Court and to the parties concerning all of his receipts and disbursements (pp. 77, 116).

His accounts are conceded to be correct pp. 131, 148).

He receives no assistance of any kind from complainant, either at the commencement of the suit, or at any time during the progress thereof, though complainant is

at all times abundantly able to supply all needful funds, being a corporation *enjoying very high credit throughout the United States* (p. 142).

The receiver seeks to terminate the receivership by filing a petition to have the property sold (pp. 35, 39).

The Court takes no action in the premises for more than a year thereafter, during which time expenses and costs are accumulating through no fault of the receiver.

The property is finally sold by the Court, the judge thereof conducting the sale (pp. 108, 109, 110).

The complainant is represented at the sale by its solicitors (p. 108).

No bid is offered on behalf of complainant (pp. 108-112).

The proceeds of sale are insufficient to meet the expenses of the receivership by $36,207.57 (pp.113, 149).

May the receiver look to the party at whose instance he was appointed, for the payment of this deficiency, or, is he limited to the proceeds of the property?

Upon whom must this great loss fall? Upon the *Court* or upon *complainant?*

THE PETITIONER'S CONTENTION.

In the Court below, petitioner, The Atlantic Trust Company contended, and contends here that the Circuit Court of the United States in and for the Ninth Circuit, Northern District of California, did not have the power

to go beyond the decree of foreclosure and sale, and compel complainant to make up the deficiency; and, that if the Court did have the inherent power so to do, it could not in this case, because prevented by its decree of foreclosure and sale, which was *final* not only as to the parties, but the receiver as well; and because the equities were in favor of appellant; and because of the laches of the receiver.

All of these questions were first presented to the United States Circuit Court in which the foreclosure suit was instituted, by the filing of the demurrer of complainant therein, to the receiver's final report and petition, asking that his supplemental accounts be approved, and that complainant be ordered to show cause why the deficiency shown by the record of the foreclosure proceedings should not be paid.

Complainant's demurrer being sustained, and the order to show cause discharged, the receiver appealed to the United States Circuit Court of Appeals for the Ninth Circuit.

> Chapman v. Atlantic Trust Company, 119 Fed. 257-270.

There all these questions were exhaustively treated in the opinion of the Court written by Judge Ross, wherein the positions taken by the receiver were each severally sustained.

After the Circuit Court of Appeals had thus determined that the petition of the receiver stated facts sufficient to entitle him to the relief sought for, the case

was remanded to the Circuit Court for further proceedings and then the case was submitted by consent of counsel upon *bill and answer;* and no replication on the part of the receiver was filed (p. 147).

After certain admissions of counsel had been made, the receiver and his counsel waiving any further claim to personal compensation or fees since the rendition of the decree of foreclosure and sale, and the solicitors of complainant admitting the correctness of the receiver's supplemental account, the Court rendered a deficiency judgment against complainant for the full amount of the expenses of the receivership then remaining unpaid (p. 148).

From this judgment complainant The Atlantic Trust Company appealed to the Circuit Court of Appeals. The judgment of the Circuit Court was affirmed and this Court is asked to review the record.

Atlantic Trust Co. v. Chapman et al., 145 Fed. 820-823.

SUBMISSION ON BILL AND ANSWER.

No replication was filed by the receiver to the answer of complainant. It was not necessary so to do (p. 147). (See order of submission 146, 147).

The petition of the receiver for the most part consisted of a statement of facts taken from the record which had been admitted to be correct (pp. 129-144).

The only additional facts pleaded in the petition aside from those of collusion between the parties related to

the supplemental proceedings concerning expenditures, which were by admissions made in open Court also conceded to be correct (p. 148).

The petition of the receiver sets forth the *deficiency shown by the record and the answer admits that this deficiency exists* (pp. 115, 131).

The petition relies upon the record for its facts and so must the answer.

In fact the answer is an elaborate recital of the facts contained in the record and also an argument based on such recital to the effect that it is not legally liable for the deficiency (p. 131).

True, in some instances the answer after adopting parts of the record, pleads facts inconsistent therewith, as where the expenses of the receivership are chargeable to the property only (p. 132); but we apprehend that such denials raise no issue, and that this Court will consider as true only those denials of the answer as do not impeach the record.

Concerning the sufficiency of the answer to deny any of the material facts of the petition of the receiver, we quote from the opinion of Judge Gilbert in Atlantic Trust Co. v. Chapman, 145 Fed. commencing at the middle of page 821:

> "Upon submission of the cause as upon bill and answer, the Trust Company was entitled to the benefit of all denials in the answer of the matters set forth in the petition and all matters properly pleaded in the answer, and the question at issue was what was a proper judgment upon the facts presented by the petition and not denied in the answer

together with the facts properly pleaded in the answer. Reynolds v. Crawfordsville Bank, 112 U. S. 405; Banks v. Manchester, 128 U. S. 244."

"The appellant contends that upon the case now presented the equities are with it and that certain allegations of the petition which stood admitted upon the record when the case was formerly before this court, are now eliminated by reason of denials in the answer, such as the allegation that the expenses were incurred on the motion or request of the appellant, that the receiver acted upon its assurances as to the sufficiency of the property to pay the foreclosure expenses, that the foreclosure was irregular and collusive and that the acts of the appellant contributed to the delay of the suit and its disastrous result. The appellant urges that the receiver himself was the person best acquainted with the situation at all times and that he should have given warning that future expenses might result in a deficit upon a sale, that so far as the final disaster was due to human mistakes, it was due to the mistakes of the receiver and his employees, and particularly to his selection of an engineer at the instance of others, and that the delays which prolonged the receivership until the break down of the dam, were due to matters beyond the appellant's control, such as intervention in the suit by outside parties and the litigation resulting therefrom. The answer sets up reasons, some by way of argument, others by statement of facts, why the appellant should not be held liable for the expenses of the receivership. *It does not deny any of the material facts alleged in the petition.* It alleges as matter of defense that the Canal & Irrigation Company was a quasi public corporation; that all the expenses were incurred by the receiver as the officer and hand of the court, not as the agent of the appellant nor for its benefit, but for the benefit of all concerned, including the public. It alleges, and this is one of the principal defenses relied on, that the appellant

is a corporation enjoying high credit in commercial communities throughout the United States, and that had it been known or understood by persons taking the receiver's certificates that it was personally liable upon them, the certificates would have been readily subscribed at a low rate of interest instead of being placed with difficulty at the high rate of 10 per centum per annum. We do not see how this defense can avail the appellant to avoid its liability. It was bound to know the law and to know the nature of the obligation which it assumed in asking the court to appoint the receiver to manage the property. It must be presumed to have had notice of the progress of the case, the difficulties of the receivership, the expenses thereof and the issuance of receiver's certificates together with the difficulty of disposing of the same. *If its credit in the commercial world would have been of aid in disposing of the receiver's certificates at a lower rate of interest, it had the opportunity to use its credit for that purpose.* It brought the foreclosure suit at the request of stockholders, it is true, but it was not bound to resort to the court or to ask for the appointment of a receiver. *The trust deed gave it the option to sell at public auction the entire property in case of default in the payment of interest.*"

The answer by not denying the material facts of the receiver's petition admits them to be true, and the question to be determined is still one of law, the right of the Circuit Court to grant the receiver the relief asked for. The same proposition that was before the Court when the demurrer was presented in that Court.

THE CIRCUIT COURT HAS POWER TO COMPEL PETITIONER TO PAY THE DEFICIT OF THE RECEIVERSHIP.

This is not a case where complainant was compelled to ask a court of equity to take charge of the property and operate it for three years before asking for an order of sale.

The trust deed provided for a sale in the event of a default in the payment of interest (p. 15).

The defendant was not offering any opposition. No one was disputing or attempting to dispute the validity or priority of the lien created by the deed of trust. And thus a proceeding that might have been wound up in a few months was allowed to drag along for many years.

Much of the mob violence threatened the receiver was due to the fact that like the defendant he had failed to pay for services rendered.

But the services required to operate the defendant's property for the period of two or three months while the property was being advertised for sale pursuant to the terms of the deed of trust, would have been infinitesimal as compared with the expenses necessarily incurred by the Court in operating this property under the most trying circumstances during a period of four years and more.

Having said this much as to there being no real necessity for the receivership, we turn now to the consideration of the question; *the power of the Circuit Court to enter a deficiency judgment.*

And this makes it necessary to consider briefly the powers, duties and obligations of a receiver.

Says Alderson on Receivers, Edition 1905, Sec. 2:

> "The office of receiver is treated as one of confidence and trust, whose powers are conferred and defined by the order of the court (citing authorities). A receiver is the officer, the executive end, of a court of equity. His duty is to protect and preserve, for the benefit of the persons ultimately entitled to it, the property over which the court has found it necessary to extend its case. He occupies a fiduciary relation to the owner of the property and all who may have claims to it. He is subject in all things to the direction and control of the court whose officer he is; and when in doubt about his duty in any particular it is his privilege to apply to the court for specific instructions."

To the same effect the Court in Knickerbocker v. McKindley Coal & M. Coal, 67 Ill. App. 294, affirmed in 172 Ill. 535, says:

> "A receiver is the hand of the Court. The Court is an instrumentality resorted to by the parties for their convenience. A receiver is, threfore, an agent appointed by the Court to serve the parties interested."

Pomeroy in Vol. 5, Section 62, Equity Jurisprudence, says:

> "A receiver is a person standing indifferent between the parties, appointed by the Court as a quasi officer or representative of the Court, to hold, manage, control, and deal with the property which is the subject matter of or involved in the controversy, under the direction of the Court, during the continuance of the litigation" (citing numerous cases to the same effect).

In railroad receiverships (and the case at bar is similar) it has been uniformly held that the Courts have the power to decree reimbursement to the receiver out of the income of the property and if that is not sufficient then out of the corpus before payment of the mortgage debt is allowed.

And the theory upon which Courts have thus proceeded is that the Court has pledged its faith to the payment of the expenses of the receivership, for, as every one knows, the Court has no property of its own with which to operate the railroads, and it must, therefore, in order to keep faith with those whom it employs, redeem its pledge by either resorting to the fund brought into Court or else to the party at whose instance and upon whose showing it was induced to undertake the management of the property.

This power is inherent. It does not depend upon consent or arise from contract.

Says Alderson on receivers, Section 332:

> "But the powers of the Court to preserve the property and keep it in a good and safe condition has been declared 'does not depend on consent or on prior notice'."

Again, the same author says in Section 611:

> "It is a general principle that, when a trust fund is brought into Court for administration and distribution, it must bear the expenses incurred in the proceedings, and they must be paid in preference to all other claims against it."

But while, as we understand it, appellant concedes the foregoing to be the law concerning the income of the property, and also the corpus, it is asserted that the Court is without the power to decree a deficiency against a complainant personally, when the income together with the fund administered, are inadequate to meet all the expenses incurred by the Court through its receiver.

If a Court has the power to protect itself to a certain extent, why not to the fullest extent?

If a Court has the power to redeem some of its pledges by resorting to the fund in its possession for that purpose, why has it not the power to redeem all of its pledges by resorting to the party that induced it to appoint the receiver, assuming that such party is able to respond?

Property cannot be administered by the Court and kept a "going concern," without expense.

Shall the Court knowingly order expenses to be incurred that it has no intention of seeing paid?

When the Court places a receiver in charge of property on representations made to it by a complainant, with orders to contract such indebtedness as appears needful, is it to be presumed that no reliance shall be placed upon the Court for the payment of this indebtedness?

Courts never would have gone to the length of making receivers' certificates a lien upon the fund brought into Court prior to the lien of the mortgage, except

for a desire to proclaim to every one dealing with the Court either as a lender of money or as an employee that justice would be meted out to him—to him, as well as to the parties.

Shall the Court dispense justice to the *parties* to a suit and deny it to *its own officers and employees?*

Ordinarily the fund is sufficient to protect the Court and its officers and employees, and the Court is not compelled to proceed further. And this is why there is a dearth of decisions on the precise question presented by the case at bar, namely, the power of the Court to look beyond the property administered upon where it fails, or proves insufficient to the complainant to make up the deficiency.

That the Court has this power in a proper case, and the case at bar is such an one, we have no doubt. And right here the opinion of Judge Ross in Chapman v. Atlantic Trust Company (supra) seems pertinent. We quote from top of page 266:

> "It is not pretended that the Court below was without jurisdiction of the parties to the suit, or of the subject matter, nor that it was without jurisdiction to appoint a receiver to take possession of and hold and operate the property pending the litigation. It follows, as a matter of course, that it had the power and that it was its duty to overlook and adjust the accounts of the receiver, and to *adjudge how and when the costs and expenses of the receivership should be paid*—subject, of course, to correction, by appropriate proceedings, of any error committed in that respect. And in this case the Court below, in its decree confirming the sale of

> the property, in express terms, retained jurisdiction of the cause for those purposes. It was in pursuance of that express provision of the decree of confirmation that the report and petition of the receiver was filed, and action thereon by the Court sought, thus not only invoking a power expressly reserved in the decree of confirmation, *but one of the powers of the Court incident to its unquestioned jurisdiction* over the parties to and the subject-matter of the suit."

To the same effect is the opinion in Knickerbocker v. McKindley C. & M. Co. (supra), 67 Ill. App., quoting from page 295:

> " It follows that while the estate in the receiver's hands is the primary fund out of which his proper expenses and compensation are to be paid, if the estate be insufficient or fail, the parties for whom he has acted may be compelled to pay the expense incurred for their benefit."

The same doctrine is also laid down in Pacific Bank v. Madera Fruit Company, 124 Cal. 525, Ephraim v. Pacific Bank, 129 Cal 589, and also in the cases cited by Judge Ross in Chapman v. Atlantic Trust Co., 119 Fed. 270, in connection with which he says:

> " We are therefore of opinion that the complainant is liable for the deficiency shown by the decrees already rendered in the cause, and for such further deficiency as may be properly ascertained, and such is the decided weight of authority."

Even in the Farmers Loan and Trust Company, 12 Oregon Pacific R. R. Co. (31 Or. 237), the principal case relied upon by petitioner, the question of the Court's power to look beyond the proceeds of the property for

the purpose of re-embursing the employees of the Court is conceded, the Court using the following language:

> "If, therefore, upon an application for the appointment of a railroad receiver, it appears probable that the income and corpus will prove insufficient to pay the expenses and liabilities thereof, we have no doubt that the *Court may require of the plaintiff* as a condition to such appointment a *guaranty of the payment of the expenses of such officer,* and, if at any time after the appointment has been made, it becomes apparent to the Court that it will be unable to pay and discharge the present or future liabilities incurred by its executive officer and manager, it should refuse to continue the operation of the road under the receiver, unless its expenses are guaranteed."

The only difference between the opinion of Judge Ross and that rendered in the Oregon case is that in the former the Court claims to have jurisdiction *after the deficiency occurs,* to look to the complainant for re-embursement, while in the latter the Court claims to have jurisdiction to compel complainant to guarantee the payment of a *deficiency that may occur,* as a condition of permitting the continuance of the receivership. In these two cases the Courts seem to entertain no doubt of their jurisdiction—differ only concerning the manner of its exercise.

THE FINALITY OF THE FORECLOSURE DECREE.

Having shown that a court of equity has the inherent power in a proper case to look beyond the income of the property, and the corpus, to the party responsible for

the appointment of the receiver, we come now to the consideration of the question whether the decree of foreclosure in this case is a "final decree" by which the receiver is concluded from enforcing his claim against the complainant personally.

Complainant holds that the *decree of foreclosure and sale was final,* and that the decree of confirmation of sale rendered about a year later, in which the Court in express terms retained jurisdiction of the cause and of the parties thereto "*until redemption is made or title "deeds have passed, as herein provided, and until the "coming in of the reports of the said clerk and receiver "herein provided for, and the final action of the Court "thereon, and the final payment of the balance of the "costs and expenses of this Court and its officers, and "of the advances made and the indebtedness incurred by "said receiver which have been or may be allowed by the "Court in the management and care of the property "placed in his charge, or until further and final order of "the Court in that behalf,*" was a mere nullity. Appellant contends that the decree of foreclosure and sale being final, not only as to the parties to the foreclosure proceedings, but to the receiver as well, the Court was without jurisdiction to compel complainant to make up the deficiency. And here we might say, in passing, that we cannot understand in view of this decree of confirmation expressly providing for all the expenses of the receivership by which complainant was put on notice as to its personal liability to pay such expenses, the receiver can be charged with laches because he did not

sooner apply to the Court for the relief which by the decree of confirmation the Court expressly stated he was entitled to receive. Forbearance on the part of the receiver should not be considered as laches, and complainant should have objected to the decree of confirmation and not have acquiesced therein if it considered the Court in error in undertaking to hold it personally responsible. But we will consider the question of laches later.

The reason that complainant did not take exception to the decree of confirmation is because such decree was considered to be a nullity and did not operate to give the Court jurisdiction to entertain the prayer of the final report of the receiver.

The petitioner asserts that in receivership cases, after the rendition of a decree of foreclosure and sale, the Court becomes powerless to protect its officers and employees unless the decree is reopened and modified—notwithstanding the fact that the receiver may be compelled, by the very order of his appointment, to keep the property a "going concern" for many months before confirmation of sale is ordered, and for many more months thereafter.

There might be something in this contention if the receiver could be held responsible for the decree of foreclosure. But he is not. It is prepared at the instance of the complainant to the suit. The receiver is not a party. To all intents and purposes he is a stranger to the litigation as regards any right of his to interfere

with any order of the Court concerning it. He cannot object to the decree of foreclosure. He cannot appeal from it. It is not made for his benefit. It is intended to adjudicate the rights of the parties only.

Mr. Justice Brewer in Bosworth v. Terminal R. Association, 174 U. S. 187, says:

> "Neither can he question any subsequent order or decree of the Court distributing the estate in his hands between the parties to the suit. It is nothing to him whether all of the property is given to the mortgagee or all returned to the mortgagor. He is to stand indifferent between the parties, *and may not be heard either in the Court which appointed him, or in the Appellate Court*, as to the rightfulness of any order which is a mere distribution between the parties."

It follows, therefore, that if a receiver cannot appeal from a decree of foreclosure, how can he be concluded by such decree? How can it be *final* as to him?

A decree final as to the parties may always be appealed from or excepted to by them, within the time allowed by law, but the receiver has no such right.

While the receiver may not appeal from a decree of foreclosure and sale, he may nevertheless appeal in certain instances.

His time to appeal does not commence to run until the close of the administration of the Court of the property. When his work is done, and when the Court upon his final petition refuses to settle his supplemental accounts, and refuses to consider his application for

re-embursement, as in this case, then he may appeal, and not before.

This is the " final decree " so far as he is concerned.

In this connection note what Judge Ross says in Chapman v. Atlantic Trust Co. (supra), 119 Fed. 266 (middle of the page):

> "There is just as little merit in the contention that the *order appealed from is not a final order.*
>
> " It is a mistake to say that by the order the Court below did not refuse to settle the accounts of the receiver. The petition was for the settlement of the account, as well as for an order that the complainant in the cause be directed to pay the full amount of the deficiency shown thereby. The order to show cause directed the complainant to appear at a time and place designated, and show, if he could, why the relief should not be granted. Upon hearing and considering the matter, the receiver's application, which, as has been said, included a prayer both for the settlement of his accounts and a judgment against the complainant for the deficiency shown thereby, was denied, and the order to show cause discharged. Nothing could more effectively and completely end the application than that order. *It was final in the strictest sense, and it was an order from ' which the receiver was entitled to appeal*, for two reasons: First, because the account the receiver sought to have settled, and allowed and ordered paid, contained an unpaid balance of $3,105.72 that had theretofore been adjudged by the Court to be due him on account of expenses of the receivership; and, secondly, because *it was his duty to exercise his powers as receiver and see that the certificates that he had issued and sold under the authority of the Court, as well as all other legitimate expenses of the receivership, be paid. We regard the decision of the Supreme Court in the case*

> *of* Bosworth v. Railway Co., 174 U. S. 182, 19 Sup. Ct., 625, 43 L. Ed. 941, *as full authority for the appeal by the receiver.*' "

The cases cited by counsel to the effect that a decree of foreclosure and sale is *final* will be found upon investigation to have no application to a receiver in charge of property belonging to *an irrigation company or a railroad.* They are cases where nothing more was to be done than to execute the original decree. They are not cases relating to property required to be kept a " going concern " for months and years after the rendition of the decree of foreclosure and sale.

In Ray v. Law, 3 Cranch 179, cited by the learned counsel for petitioner, which was not a receivership case, though one relating to a mortgage foreclosure of real estate the Court said:

> " We can do nothing without seeing the record, and the papers offered cannot be considered by us as the record. The Court, however, is of the opinion that a decree for a sale under a foreclosure and mortgage is such a final decree as may be appealed from."

Here no property was required to be kept in the custody of the Court and operated at great expense. There was nothing more to be done than to enter the *decree which positively fixed the rights of the parties.*

Again, in the Palmyra, 10 Wheaton 504, the case of Ray v. Law is referred to, the Court saying:

> "In that case, which was an appeal in an equity cause, there was a decree of foreclosure and sale of the mortgaged property. The sale could only be

> ordered after an account taken in the sum due, or ascertained in some other way, and the usual decree is that unless the defendant shall pay the sum in a given time the estate would be sold. The decree of sale, therefore, is in such a case *final upon the rights of the parties* in controversy and leaves only ministerial duties to be performed."

In these cases no receiver was attempting to appeal from a judgment of foreclosure, nor was any officer or employee of the Court affected by the judgment. The only persons to whom the judgment was directed were the *parties to the action.*

Whiting v. Bank of U. S., 13 Peters 6, cited by counsel, was another mortgage foreclosure suit in which no receiver was appointed.

The dispute was between the parties as to the finality of the decree of foreclosure for the purposes of an appeal.

In Forgay v. Conrad, 6 Howard 201, also cited by counsel, the purpose of the suit was to set aside fraudulent deeds by an assignee in bankruptcy.

The deeds were decreed to be fraudulent and the judgment setting them aside final.

The Supreme Court of the U. S. in Beebee v. Russell, 19 Howard 283, defines very clearly *the difference between decrees that are final from those that are not* It reviews the Palmyra case, which was one of libel for tortious seizure, where restitution, costs and damages were decreed. The amount of damages not having

been ascertained, the decree was not final and the appeal dismissed.

Also

Ray v. Law, 3 Cranch 179;
Whiting v. Bank of U. S., 13 Peters 6, and
Forgay in 6 Howard 201.

showing that these cases do not conflict with the proposition of law that

> "reference of a case to a master, to take an account upon evidence and from the examination of the parties, and to make or not make allowances affecting the rights of the parties, and to report his results to the Court *is not a final decree;* because his report is subject to exceptions from either side, which must be brought to the notice of the Court before it can be available. It can only be made so by the Court overruling the exceptions, or *by an order confirming the report with a final decree for its appropriation and payment.* We have just said that *decree is final when ministerial duties are only to be done to ascertain a sum due.*"

But Beebee v. Russell (supra) was not a receivership case, and therefore the power of Court to settle the accounts of a receiver, etc., after decree of foreclosure and sale, was not a matter that the Court could pass upon.

That a decree of foreclosure is not final as to the receiver of an irrigation company required to be kept in operation is abundantly shown by the authorities.

In Pacific Bank v. Madera Fruit Company the Court found that

"on January 31st, 1894, the plaintiff filed its complaint and among other things asked for the appointment of a receiver to take charge of a large amount of real and personal property. One S. Ephraim was at the request of plaintiff appointed receiver to take charge of all the property described in the complaint. He filed the proper bond, took the oath, and thereupon took charge of the property as such receiver.

"Thereafter, on March 6th, 1905, before the issuance of any summons or the appearance of any defendant, the plaintiff filed with the clerk a written dismissal of the case, and *judgment of dismissal was accordingly entered by the clerk.* Thereafter said receiver filed his account and petition and asked the Court to settle the same and fix his compensation, etc. The plaintiff thereupon made a special appearance and filed a written motion to dismiss the account and petition of the receiver on the ground that by the judgment of dismissal of the said action the Court had lost jurisdiction to settle the said account. The Court overruled said motion and proceeded to hear the account of the receiver, and after hearing the evidence made an order settling the account. From this order the plaintiff appealed. *The only question argued or presented on this appeal was as to whether or not the plaintiff having dismissed the action the Court had jurisdiction* to hear and settle the accounts of the receiver. *The Court held that it had such jurisdiction, and we think its conclusion correct.*

In Beach on Receivers, Section 796, the author lays down the rule as follows:

" 'The end of the suit, its final adjudication, gives cause for the discharge of the receiver, but does not ipso facto effect his discharge, which results only from an order or decree of Court so directing. *After the settlement of the suit, the receiver must*

have time and opportunity to prepare and present his accounts and for the adjustments of the details of the receivership. The dismissal of the action does not discharge the receiver from accountability to the Court which appointed him. *He is an officer of the Court and subject to its orders in relation to the property placed in his hands as receiver until discharged by the Court.'* The same rule is given by High on Receivers, Section 833, and is stated as follows:

"It is to be observed, however, that the abatement of the action, or the entry of final judgment therein, does not have the effect of discharging the receiver, ipso facto. And although as between the parties to the litigation his functions have terminated with the determination of the suit, he is still amenable to the Court as its officer until he has complied with its directions as to the disposal of the funds which he has received during the course of his receivership."

The Court cites the following cases in support of this view:

State v. Gibson, 21 Ark. 140;

Ireland v. Nichols, 40 Howard Pr. 85;

Whiteside v. Prendergast, 2 Barb. Ch. 471;

Field v. Jones, 11 Ga. 418;

Garniss v. Supreme Court, 88 Cal. 415.

And the Court, in concluding, uses the following language:

"*If the Court below lost jurisdiction of the case by virtue of the dismissal* so that it could not settle the accounts of the receiver, nor make any disposition of the funds in his hands, how would the account be settled or the funds disposed of? The money on hand and collected by the receiver is in contemplation of law in the hands of the Court,

to be disposed of as the law directs. The expenditures made by the receiver for the preservation of the property, and under the orders of the Court and at the request of the parties, should be repaid by some one. If the Court in which the receiver was appointed, cannot, after the dismissal of the case, settle and adjust the accounts of the receiver, to what jurisdiction will he resort? *The dismissal of the case was the end of it as between the parties,* but we think the Court still retained the power to settle the accounts of its receiver and to direct the application of the funds in his hands."

The foregoing is a very clear, concise and strong argument in favor of the proposition that a final decree is not conclusive as to the receiver who is not a party to the litigation.

A judgment of dismissal is as much a *final decree* as is a decree of foreclosure and sale. If the Court does not lose jurisdiction by the entry of a judgment of dismissal then it cannot lose jurisdiction to settle the accounts of the receiver after the rendition of a decree of foreclosure and sale by which only the rights of the parties to the litigation are fixed and determined.

In the case of Ephraim v. Pacific Bank (supra) the Court uses the following language:

"It is urged by the respondents, in support of their demurrer and of the judgment thereon, *that inasmuch as the Court did not designate the persons by whom the expenses of the receivership should be paid, the only remedy of the receiver was to collect them out of the property of which he was placed in charge, and that, having failed to collect them in this manner, he has no right of action therefor against the parties to the suit.* It is unquestionably

> the general rule that the costs of a receivership are primarily a charge upon the fund in his possession, and are to be paid out of that fund. But it is by no means the rule that a receiver must in all cases look to that fund for his reimbursement, and has no other remedy if for any reason that fund is not available."
>
> "Mr. Beach says (Beach on Receivers, Section 773):
>
> "'But it may sometimes happen that a direct liability is imposed upon the parties to the action, or upon some of them, for the remuneration of the receiver. This may result from the irregularity of the appointment, or *from the insufficiency of the fund,* or out of the agreement between the parties.'"

The Ephraim case came before the Supreme Court a second time. It was then determined that the receiver was not entitled to have the expenses of the receivership paid by plaintiff because he had asked for the appointment, *agreeing to look to the property solely for his remuneration.*

Ephraim v. Pacific Bank, 136 Cal. 646.

This decision negatively supports the proposition for which we are contending, the right of the receiver to compel the complainant at whose instance he was appointed to make good the expenses of the receivership *after the termination thereof, and without the necessity of attempting to modify or appeal from, the decree of foreclosure and sale.*

Moreover, in the case at bar, it cannot be urged that the receiver made any request for his appointment, or

made any agreement as to how or when the expenses of the receivership should be paid. So that the failure of Ephraim to recover does not effect the rights of the receiver in this case.

Referring again to the Bosworth case, 174 U. S. 183 (supra), we desire to call the Court's attention to the fact that there it was held that where in a foreclosure of a mortgage on the property of a railroad company the receiver is decreed to pay the claims of an intervener, *the receiver may appeal, although prior to the decree* the property had been sold under the decree and had actually passed out of his hands.

The theory upon which he was allowed to appeal depended upon the proposition that it was his privilege to protect the property and the parties of the litigation against the claim of an intervener.

And here we ask if a receiver may appeal from an order not affecting him personally, made by the Court after the property had passed out of his hands for the benefit of a party to the litigation, why may he not appeal when the Court refuses to settle his final accounts, etc.? Why is he concluded by an order of foreclosure and sale that does not effect him personally and from which he could not appeal, if it did, and denied the right to appeal from a final order or decree made directly against him, by which he may be made bankrupt?

And right here it is interesting to note what the Court says in Bosworth v. Railroad (supra) of the rights, duties and obligations of a receiver in relation to the property of which he has taken possession under the

order of Court so different from what the Supreme Court of Oregon says in Farmers Loan & Trust Company v. Oregon R. R. Co., 31 Oregon 237, supra, on the same subject.

> "It becomes important to consider what are the rights and duties of a receiver in respect to claims made against the estate in his possession. It is often said that he is merely the hand of the Court which has appointed him; and for certain purposes that is not an inapt expression. He is charged with the duty of carrying into execution the orders of that Court, but he is also a custodian of property, *and has by virtue of such custody certain obligations to the parties owning or interested therein.*
>
> "First. A receiver may defend, both in the Court appointing him and by appeal, the estate in his possession against all claims which are antagonistic to the rights of both parties to the suit. For instance, he may thus contest a claim for taxes because if valid they are superior to the rights of both parties; in a case like the present superior to the rights of mortgagor and mortgagee.
>
> "Second. He may likewise defend the estate against all claims which are antagonistic to the rights of either party to the suit, subject to the limitation that he may not in such defense question any order or decree of the Court distributing burdens or apportioning rights between the parties to the suit, or any order or decree resting upon the discretion of the Court appointing him. As this is a matter especially pertinent to the present controversy it may be well to consider briefly the scope of this proposition: A suit is brought by a mortgagee to foreclose his mortgage, and a receiver is appointed to take possession of the mortgaged property. The right to have a decree of foreclosure and sale is an absolute right on the part of the mortgagee, flowing from a breach of the conditions

in the mortgage. But the appointment of a receiver is a matter resting largely in the discretion of the Court—not, of course, an arbitrary, but a legal discretion—and depending, not simply upon the breach of a condition in the mortgage, but also upon the question of relative injury and benefit to the parties and the public by the taking of the property of the possession of the mortgagor, and placing it in the hands of a receiver. In appointing a receiver the Court has a right within certain recognized limits to prescribe the terms and conditions of the appointment. *A receivership is not essential to a foreclosure and sale, and the Court is charged when an application therefor is made, with the duty of inquiring whether, under all the circumstances, considering the interest of the parties and the public it is wise and proper to take possession of the property.* It may in its judgment be necessary to appoint a receiver without prescribing any terms. It may be that the interests of the parties or the public require that the appointment shall be made subject to certain conditions. *Now these conditions, whatever they may be, are beyond the challenge of the receiver.* He may not say directly or indirectly 'I accept the appointment, I take charge of the property, but I repudiate the terms and conditions imposed on the receivership.' Whether under the present state of the statutory law in reference to appeals any review can be had of the terms of such an order, it is clear that a receiver, whose rights spring from the appointment, cannot be heard to question them.

"Third. *Neither can he question any subsequent order or decree of the Court distributing the estate in his hands between the parties to the suit. It is nothing to him whether all of the property is given to the mortgagee or all returned to the mortgagor. He is to stand indifferent between the parties and may not be heard either in the Court which appointed him, or in the Appellate Court, as to the*

rightfulness of any order which is a mere order of distribution between the parties. In this connection it must be noticed that an intervener, although for certain purposes recognized as a party to the litigation, is not such a party as comes within the scope of the limitation just announced. He is one who comes into the litigation asserting a right antagonistic or superior to that of one or both of the parties thereto, and a receiver, who represents, so far as the property is concerned, the interest of the parties, may rightfully challenge his claim; *provided that in such challenge he does not question any orders of the Court heretofore referred to.* Let us take some illustrations: A suit is brought to foreclose a mortgage; a receiver is appointed, and the mortgaged property taken possession of. A party intervenes, asserting that he has a claim against the mortgagor and the property, but conceding that it is subordinate to the claim of the plaintiff mortgagee. With that concession the mortgagee stands perfectly indifferent to the question whether the claim be allowed or not. Still, it cannot be doubted that in such a case the receiver, holding the property against which a claim is made, can defend, and defend not only in the Court appointing him, but also by appeal. In that defense he not only represents, it may be said, the mortgagor's interests, but also protects the property in his possession.

"Take another case: An intervener presents a claim against the mortgaged property which the mortgagor admits. There is, therefore, no defense to be interposed in behalf of the defendant mortgagor, no protection to be sought for the property, and the only question is whether such claim, admitted by the mortgagor, is to be satisfied out of the mortgaged property prior to the claim of the mortgagee. The latter is the only party who has an antagonistic relation to the intervener. Now, the receiver, who represents both mortgagee and mortgagor, both plaintiff and defendant, so far as

the custody of the property is concerned, is entitled to defend against this claim of priority made by the intervener, and may defend both in the Court appointing him, and also by appeal. *It is true in such defense he may not be heard to say that the terms and conditions imposed in the order of his appointment were improper,* but he may defend on the proposition that the claim presented does not come within those terms and conditions. Whatever right, if any, the mortgagee plaintiff may have to question, in resisting such claim, the validity of the terms of the appointment, the receiver cannot do so; and the only defense he can make is that the claimed priority has no foundation in the terms of the order; or, if it be a matter entirely outside of those terms, that it has no foundation in any recognized legal or equitable principle.

"In the case at bar one defense, as shown by the exceptions taken to the report of the master, was that the claim of the intervener was not against the estate, but against some third party. That defense the receiver had a right to make. We do not mean that he alone can act; we do not stop to inquire what rights either party to the suit may have in this respect. All we now decide is that the receiver is a proper party to make the defense. And when he alone makes it, when he carries on the litigation in his own name as receiver, then as the representative and custodian of the estate he can, subject to the supervision of the Court, bind it by admissions made in good faith in the progress of the litigation. And as in the Appellate Court, after the appeal had been perfected, he being the only party to the appeal, admitted that it was a just claim against the mortgagor and within the priority over the mortgage prescribed in the order of appointment, his admission showed that the allowance was right, and that the decree ought to be affirmed. But still, until that admission was made, there was a pending dispute, and he was a proper person to appeal from the allowance.

"Fourth. *He may appeal from an order or decree which affects his personal rights,* provided it is not an order resting in the discretion of the Court. *Thus he may not appeal from an order discharging or removing him, or one directing him in the administration of the estate, as for instance to issue receiver's certificates, to make improvements, or matters of that kind, all of which depend on the sound discretion of the trial Court.* He may *appeal from an order disallowing him commissions or fees, because that affects him personally,* is not a matter purely of discretion, and does not delay or interfere with the orderly administration of the estate.

"Fifth. His right to appeal from an allowance of a claim against the estate does not necessarily fail when the receivership is terminated to the extent of surrendering the property in the possession of the receiver. It is a common practice in Courts of equity, anxious as they are to be relieved from the care of property, to turn it over to the parties held entitled thereto, even before the final settlement of all claims against it, and at the same time to leave to the receiver the further defense of such claims, the party receiving the property giving security to abide by any decrees which may finally be entered against the estate. An admission that the railway property had been turned over to the purchaser is not therefore of itself conclusive against the right of the receiver to appeal. And the fact that the trial Court allowed the appeal must in the Appellate Court be taken, in the absence of other evidence, as sufficient authentication that such reservation of authority had been made in the order directing the surrender of the property."

We have quoted quite extensively from the foregoing case because it presents concisely nearly the whole law upon the subject of the relation of receivers to the parties, to the Court and to the property. It is an instance

of a railroad receivership, and is a complete answer to the argument of the Trust Company concerning the receiver's right of appeal in the case at bar.

THE EQUITIES OF THE CASE.

Having shown that the Circuit Court has the inherent power to grant the relief asked for by the receiver, and having shown that the receiver is not concluded by the decree of foreclosure and sale, but that such decree is not *final* as to him, we come now to the consideration of the equities of the case.

Appellant asserts that the equities of the case are against the receiver. Why? Because it is claimed that: 1st. Receiver's certificates were issued payable only out of the fund—a fact charged by the answer, but shown to be untrue by the record, which was made a part of the answer by reference and incorporation. The record contains no such fact. Appellant cannot adopt the record and repudiate it in the same pleading.

2nd. The holders regarded the investment as one involving great risk owing to the fact that the certificates bore interest at 10 per cent, in spite of the high credit of the complainant, upon which no one relied.

Is this a sufficient reason for asserting that the equities are against the receivers?

Is it a sufficient argument to assert that because receiver's certificates do not sell readily even upon an agreement on the part of the receiver to pay 10% inter-

est, that the holders thereof are convinced that a complainant residing 6,000 miles distant is not personally liable therefor? Should it not rather be said that because complainant avoids making any purchase of these high interest bearing certificates that there is something wrong with the property either as to the title or value thereof? Or that possibly the complainant had brought the property into Court for purposes of speculation or exploitation pending the financial stringency everywhere prevailing?

When a party asks a Court to administer property and will not buy receiver's certificates bearing a high rate of interest, why should an outsider and a stranger to the proceeding be expected to look with favor upon the investment?

Surely the equities are not against the receiver, because receiver's certificates could not be easily floated—because they were viewed with suspicion.

What answer is there to the question, "Why does not the Atlantic Trust Co. buy these certificates?" Does it not know that the property is valuable? If not, why is the Court asked to operate the property?

What is true of certificates is true of all other expenses.

TIME CHECKS.

Much criticism is directed against the receiver for issuing time checks. What are they? Merely evidences of the fact that certain persons had been employed by

the receiver and had not been paid—either in money or certificates. These persons were necessarily employed. They are entitled to payment equally with those who furnished money. It was a matter of no moment whether the receiver had sufficient money to hire workmen, or had the workmen themselves.

3rd. Appellant further claims that it is admitted that at no time during the receivership or thereafter, until all right either of redemption or of appeal had expired, did any certificate holder, or the receiver, or anyone else, make a claim that the Atlantic Trust Company was responsible.

Petitioner is mistaken. The decree of confirmation was itself a declaration made by the Court on behalf of the receiver and his employees that the complainant would be held personally liable for any deficit (p. 112).

And the receiver took his appeal within the time allowed by law.

The decree of foreclosure and sale contained no provision relating to a deficiency, and this for the very good reason that complainant induced the Court to fix the upset price at $120,000. There could be no deficiency unless the Court should reduce the price.

To have fixed the minimum price of the property at $120,000 was tantamount to a declaration on the part of the complainant, for whose benefit the order was made, that the usual course would be pursued by the Trust Company—the taking in of the property at about that price if no better bid was offered.

It would have been an impertinence on the part of the receiver to have attempted to have meddled with a decree drawn agreeably to his interests.

No objection was made by complainant to the order of confirmation of sale, nor did it thereafter make any effort to obtain the property for its benefit. It was perfectly willing that the receiver and his counsel should enjoy whatever benefit could be derived from remaining in control of property that had been operated for many years by them without a sufficiency of funds.

Much is said about the fact that the property was bid in for an amount only a little ($3,000) in excess of the compensation allowed the receiver and his solicitor.

But in this connection we desire to direct the Court's attention to the fact that when the compensation of the receiver and his solicitor's fees were fixed by the Court without objection by anyone, it was in evidence that $175,787.15 (p. 30) had been expended on the property before the receiver was placed in charge thereof, and that in complainant's bill of complainant a solicitor's fee of $10,000 was prayed for. These matters, taken in connection with the making $120,000 the minimum price of the property, must be considered as equivalent to positive declarations of complainant that there would be no deficiency.

The highest bid that Judge Morrow could induce anybody to give in cash was $12,500. This was $8,500 less than the amount offered by the assignee of the receiver, whose bid was $21,000—$3,000 cash to cover costs of

sale and the balance the claims of the receiver and his counsel.

The Alantic Trust Company made no offer whatever. The property was not even worth $12,500—to the Trust Company. It was considered by it to be practically worthless and that is why the receiver and his solicitor were welcome to it.

The decree of confirmation was also considered to be not worth objecting to.

The conduct of the Trust Company shows that it did not intend to redeem—and as for being deprived of the right of appeal by anything that the receiver has done or omitted to do, that cannot be seriously considered for a moment. Appeal from what? The decree of foreclosure prepared by itself, in which all of the expenses of the receivership are adjudicated, having been approved by the Master in Chancery? If the expenses incorporated in the foreclosure decree were not correct complainant should have disputed them.

The decree of confirmation might have been appealed from or excepted to. But no steps were taken by the Trust Company whereby to modify or set it aside.

In Chapman v. Atlantic Trust Company (supra), page ——, the Court says:

> "*Nor does any objection appear to have been at any time taken by the complainant to the sale or to any of the provisions of either the original decree of foreclosure and sale or that confirming the sale.* In and by the latter, as has been shown, the *Court below in express terms retained jurisdiction* of the subject matter and the parties thereto."

Judge Gilbert in considering the proposition here involved in Atlantic Trust Co. v. Chapman, page 822, says:

> "The appellant relies on the defense of laches as against its liability for the costs incurred by the receiver. It has not specified the laches in pleading that defense in its answer, but it argues that the facts show that it was kept in unsuspecting quiet until the time had expired when it could either bid on the foreclosure sale or redeem from that sale, or appeal from the foreclosure decree, and that had there been any claim that it would be held responsible for the deficit caused by the receiver's management of the property, there can be no doubt that it would have protected itself by bidding at the sale up to the full amount of the deficit, whereby it would have the property to exploit and sell.
>
> "*This argument is based upon the assumption, unsupported by anything discoverable in the record, that the property in the foreclosure sale, sold for less than its full value. We are not warranted in assuming that it sold for less. If it did, was it not the duty of the Trust Company, protecting the bondholders, to see that it did sell for its full value or to redeem in case it did not?* Its duty to avoid payment of receiver's expenses was no greater than its obligation to its cestuis que trustent to protect their interests in the foreclosure sale. *We can discover no ground for imputing laches to the receiver. It was not among his duties to advise the appellant of his understanding of its legal liability to him. It was its duty to know it.*"

4th. "That it appears that the bulk of the certificates " were not regarded at the time as having been issued " for the benefit of those other persons whom the re- " ceiver was bound equally to consider, namely, that " portion of the public for whose benefit the canals and " ditches and laterals and dams had been constructed,

" and up to that time maintained." (Brief of appellant, p. 43.)

No doubt the public received some benefit from the operation of the property, and that some of the public were particularly benefited by being furnished water, and for that reason they assisted the receiver to maintain the property. But the Trust Company could not be persuaded by anything done in the premises to expend a dollar either for its own benefit or the benefit of the property, or the Court whose services it requested.

The preservation of the property would, of course, be beneficial to the public, but the public pays for the benefit it receives by buying the water. It does not get something for nothing.

We cannot see that the benefit the public received has any bearing upon the question of appellant's liability, any more than the benefit the public receives from the operation of a railroad in the hands of a receiver serves to absolve the parties therein from liability.

Are the equities against the receiver merely because the public may have had erroneous notions about receiver's certificates concerning the question of the apportionment of benefits?

The fact still remains that *this property was brought into Court by appellant* and not by the public, and remained there for years with full knowledge upon its part that the public had no power to bring the receivership to a close.

And therefore it must be held that the appellant was the party beneficially interested.

But appellant says: "Non constat, but had the par- "ties both asked an abandonment of the irrigation "service pendente lite, the Court might have considered "it in the public interest to disregard their wishes."

True enough. But, before disregarding their wishes, might not the Court say to complainant: "You are a "corporation enjoying high credit throughout the "United States. You have properly brought this pro- "ceeding. A receiver is necessary. It is the order of "the Court that pendente lite that you provide the "Court with sufficient funds to keep the property a "going concern."

No doubt if complainant was unable to advance the necessary expenses, the Court might be compelled to abandon the property to its fate from sheer inability to induce anyone to accept its promises to pay. There are some things that even a Court cannot do. It cannot operate property without funds or credit. The complaint here had both, but did not use them to aid the Court—and hence the result.

5th. "The receiver cannot charge the complainant "with amounts borrowed on his own responsibility "after consulting only with the farmers of the vicinity, "for the purpose of making repairs through an en- "gineer selected neither by the Court nor by himself "nor by the complainant, but by these very farmers" (brief p. 43).

All that complainant knows of this matter is derived from the various reports of the receiver, to which no objection was made at the time on the part of anyone.

Whatever money the receiver borrowed was in aid of the receivership.

W. C. Pidge was selected as engineer, not by the farmers, but by the receiver. The engineer was competent. He was not less so because the farmers were satisfied with him. He was the old engineer of the company, tried and true. All who knew him had complete confidence in him, including the receiver, and he was known by everyone in that vicinity. The receiver used his own discretion pursuant to the order of his appointment in selecting Mr. Pidge. He did not need the aid of complainant or of the Court to determine the question of his competency or fitness to do the work assigned.

The selection of the engineer was a proper one.

6th. "It was the duty of the receiver, if there was "any reason whatever to anticipate a possible deficit "upon the sale, to apprise the Court and parties "promptly of the danger."

The receiver from the beginning pointed out to the Court the dangers of the situation, the fact that the property was depreciating in value; and when the immense dam of the Canal Company had become undermined he reported fully thereon and suggested that the property be disposed of two years before it was actually sold (p. 39).

And, therefore, it was for complainant to judge whether there ought to be a deficit. The complainant had the right to bid in the property and prevent a deficit if it cared to. And when it induced the Court to fix the minimum price of the property at $120,000, it virtually declared that there would be no deficit.

All that the receiver could do was to report, suggest and ask. These things he did. He performed his full duty in these respects.

7th. It is not true that the receiver as late as August, 1896, or that he ever gave the parties to understand that appellant had not incurred any liability.

THE OREGON CASE.

Upon the right of the receiver to claim the payment of the deficit from complainant personally, it is conceded that the Oregon case is at a variance with the decisions of the Supreme Court of California—notably Pacific Bank v. Madera Fruit Co., 124 Cal. 525, and Ephraim v. Pacific Bank, 129 Cal. 589, and also with the two decisions of the Circuit Court of Appeals above referred to, and with Bosworth v. Railroad, 175 U. S. 183.

But the reasoning of that case appears to us to be in conflict with the inherent power of a Court of equity to protect its officers as well as the parties over which it has assumed jurisdiction.

The reasoning of Judge Ross in Chapman v. Atlantic Trust Company (119 Fed. 267) appears to us to be unanswerable. The judge says:

> "On principle it seems to us impossible to assign any good reason why, if the Court was empowered at the time of the commencement of the suit, or at the time of the appointment of the receiver, to compel the complainant to pay into Court sufficient money to cover the expenses of the receivership, or to give security for such payment, including the payment of whatever certificates might be authorized to be issued by the receiver, the Court has not precisely the same power to adjudge, upon the settlement of the receiver's account, that the complainant make good any deficiency in the matter of such expenses—having by its decree in express terms retained jurisdiction of the cause and of the parties thereto for the purpose of settling the receiver's account and ordering paid the costs and expenses of the receivership. The case of Farmer's Loan Co. v. Oregon Pacific R. R. Co., 31 Or. 237, relied upon and approved by the Court below, does not commend itself to our judgment. The Court there said:
>
> " 'It is not perceived upon what ground it can be claimed that, because the expenses of the receivership are allowed without any fault of his to exceed the value of the mortgaged property, thus entirely destroying his security, he must, in addition to the loss of his debt, be compelled to make good the deficit, unless the order of appointment was made upon that condition. He has no control over the acts of the receiver, and if, without his consent, he is to be held responsible therefor, he is liable to absolute bankruptcy and ruin. Such a rule would render the plaintiff's position so uncertain and precarious as practically to preclude him from any protection whatever through the appointment of a receiver pending the foreclosure suit. But the inquiry is made, "Shall not a railroad mortgagee who

applies for and obtains the appointment of a receiver, with authority to operate the road, be held responsible for the liabilities incurred by such officer when they cannot be made out of the property itself?'' We think not, unless such responsibility was imposed as a condition to the appointment or the continuance of the receiver in office. The appointment of a receiver in a suit to foreclose a railroad mortgage is not a matter of strict right, but rests in the sound judicial discretion of the Court; and it may, as a condition to issuing the necessary order, impose such terms as may, under the circumstances of the particular case, appear to be reasonable, and, if not acceded to, may refuse to make the order: 30 Am. L. Rev. 161, Fosdick v. Schall, 99 U. S. 235.

'' 'If, therefore, upon an application for the appointment of a railroad receiver, it appears probable that the income and corpus will prove insufficient to pay the expenses and liabilities thereof, we have no doubt that the Court may require of the plaintiff, as a condition to such appointment, a guaranty of the payment of the expenses of such officer. And if, at any time after the appointment has been made, it becomes apparent to the Court that it will be unable to pay and discharge the present or future liabilities incurred by its executive officer and manager, it should refuse to continue the operation of the road under the receiver, unless its expenses are guaranteed. No Court is bound or ought to engage or continue in the operation of a railroad or any other enterprise without the ability to promptly discharge its obligations, and, unless it can do so, it should keep out or immediately go out of the business. But unless such terms are imposed as a condition of the appointment or continuation in office of the receiver, his employes must look to the property in the custody of the Court and its income for their compensation. They have no claim whatever on any of the parties to

the litigation. They are the employes and servants of the Court, and not of the parties. Their wages are in no sense costs of the litigation; and, although incurred during the progress of the suit, they are not incurred in the suit. They are neither expenses of the plaintiff, nor of the defendant, and are not fees or costs which can be charged against the successful party to the litigation, as is sought to be done in this case.'

"The party who asks for the appointment of a receiver does so voluntarily and because he thinks it to his interest to have the possession of the property in controversy pass into the hands and control of the Court pending the litigation. It is true that the receiver, when appointed, becomes the officer of the Court and not the agent of either party to the suit, but he is appointed to serve the parties interested. He holds the property, and, when operating it, operates it for the benefit of whomsoever shall be finally adjudged to own it. But he cannot be justly held to hold it and operate it at his own expense or that of the Court. Those who render services in and about the receivership are justly entitled to be paid the fair value of such services, and when the issuance of receiver's certificates becomes necessary for the proper preservation of the property, and such certificates are authorized by the Court to be issued by the receiver for money to be used for such purposes, those who buy the obligations are entitled to have them paid. How? In cases like the present, out of the property or its proceeds, certainly. No one, we apprehend, will question that. But the property having been sold for but a trifle more than the amount theretofore allowed the receiver and his attorney for their services in and about the receivership, and they credited with such allowance on their bid, who is to suffer? The complainant, at whose instance the receiver was appointed, or those who, relying upon his acts, based upon the authority and sanction of the Court, in-

vested their money and rendered their services in and about the operation and preservation of the property? It is not difficult to determine on which side of this question are the equities. With due deference we are unable to see any force in the suggestion of the Supreme Court of Oregon in the case cited that, as the complainant in such a suit has no control over the receiver, if he be held liable for the expenses of the receivership, in the event the property prove insufficient to pay them, he may be bankrupted. At the same time it is conceded by that learned Court that where it appears probable that the property will prove insufficient, the Court may require as a condition to the appointment of a receiver a guaranty of the payment of the expenses of such officer, and a like guaranty subsequently, on pain of the discharge of the receiver, when it becomes evident that the property will prove insufficient to pay the expenses. The theory of the manifestly is, that in these two instances the complainant can inform himself of the probable outcome of the property, and if he be not willing to give the guaranty he will not secure the appointment of a receiver in the one instance, or his continuance in office in the other. But why should he not be required to inform himself, also, when no such condition is imposed by the Court? Precisely the same opportunity on complainant's part, and precisely the same duty to inform himself in that respect, exists in the absence of the requirement of the guaranty mentioned. The complainant, whose lien upon the property it is sought to foreclose, in the nature of things must and should be held to have much better information regarding the value of the property and its probable outcome than the Court. Indeed, it is not easy to see how the Court can be properly expected to know anything about it. The appointment of a receiver, if made at all, is usually made at the request of the complainant—occasionally, as in the case at bar, with the consent of

the defendant If the complainant was not willing to pay the expenses of the receivership it asked for, in the event of the insufficiency of the property to do so, it should not have asked the Court to make the appointment, incur the liabilities and pledge its faith to their payment. It was the duty of the complainant to keep informed in respect to the progress of the receivership, the property, and its probable outcome, and whenever it became unwilling to further stand good for any deficiency, to ask the Court to bring to an end the business it undertook and was conducting on complainant's petition.

"We are therefore of opinion that the complainant is liable for the deficiency shown by the decree already rendered in the cause, and for such further deficiency as may be properly ascertained; and such is the decided weight of authority. See Beach on Receivers (Alderson's edition), Sec. 773; Ephraim v. Pacific Bank, 129 Cal. 589; Pacific Bank v. Madera Fruit, etc. Co., 124 Cal. 525; Tome v. King, 64 Md. 166; Howe v. Jones, 66 Iowa 156; Espuella Land & Cattle Co. Ltd. v. Bindle *et al.*, 32 S. W. 582; Knickerbocker v. McKindley Coal, etc. Co., 67 Ill. App. 291; affirmed, 172 Ill. 535; Farmers' National Bank v. Backus, 77 N. W. 142; Bassick Mining Co. v. Schoolfield, 15 Colo. 376; Cutter v. Pollock, 7 N. D. 631."

We have shown:

1st. That a Court of equity in a proper case has the inherent power to compel a complainant to make up a deficit of a receivership.

2nd. That a decree of foreclosure is not a "final decree" by which a receiver is concluded.

3rd. That a receiver has the right to appeal from an order refusing to settle his final and supplemental ac-

counts, and from an order discharging an order to show cause why the deficit of a receivership should not be charged to the complainant personally.

4th. That the answer in the case at bar is an admission of the facts set forth in the receiver's final petition.

5th. That the equities are with the receiver.

Wherefore the judgment of the Circuit Court should be affirmed.

Respectfully submitted,

EDGAR C. CHAPMAN,

Respondent in person.

December, 1907.

ATLANTIC TRUST COMPANY *v.* CHAPMAN, RECEIVER OF THE WOODBRIDGE CANAL AND IRRIGATION COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 109. Argued January 15, 16, 1908.—Decided February 24, 1908.

A receiver, as soon as he is appointed and qualifies, comes under the sole direction of the court and his engagements are those of the court, and the liabilities he incurs are chargeable upon the property and not against the parties at whose instance he was appointed and who have no authority over him and cannot control his actions.

While cases may arise in which it may be equitable to charge the parties at whose instance a receiver is appointed with the expenses of the receivership, in the absence of special circumstances the general rule, which is applicable in this case, is that such expenses are a charge upon the property or fund without any personal liability therefor on the part of those parties; and the mere inadequacy of the fund to meet such expenses does not render a plaintiff who has not been guilty of any irregularity liable therefor.

145 Fed. Rep. 820, reversed.

THE facts are stated in the opinion.

Mr. Stanley W. Dexter, with whom *Mr. Edward B. Whitney* was on the brief, for petitioner:

The Circuit Court was without power to compel the complainant to pay the deficit of a receivership which was in all respects regular, after final judgment in complainant's favor.

There is no inherent power in any court to award costs, in the absence of statute, and where costs are authorized by statute, they follow the judgment and are taxed to the losing party, as was done in this case. *Wallace* v. *Sheldon*, 76 N. W. Rep. 418 (Nebraska); *In re Commissioners*, 20 App. Div. 271 (New York); *In re City of Brooklyn*, 148 N. Y. 107.

Priority is given to the compensation of receivers and their solicitors over receiver's certificates, and such allowances have

sometimes been called "costs of the proceeding to be paid out of the fund." *Petersburg Savings Co.* v. *Dellatorre*, 70 Fed. Rep. 643; *Radford* v. *Folsom*, 55 Iowa, 276.

There is no suggestion, however, that they can be taxed against a successful party, and in the present case, the receiver and his solicitors have been paid.

The receiver's counsel has in prior arguments urged certain provisions of the California Code. It seems unnecessary for us to discuss these, since the equity practice of the Federal courts is uniform throughout the United States and does not in any respect follow that which prevails in the various localities. 1 Foster's Fed. Prac. (3d ed.), pp. 10–12, 120–121; *Boyle* v. *Zacharie*, 6 Pet. 648, 658; *First National Bank* v. *Ewing*, 103 Fed. Rep. 168, 194; *Kirby* v. *Lake Shore R. R.*, 120 U. S. 130, 137; *Goodyear Co.* v. *Dancel*, 119 Fed. Rep. 692; *Phinizy* v. *Augusta Railway Co.*, 98 Fed. Rep. 776. Even in common law actions costs are not governed by provisions of state legislation. *United States* v. *Treadwell*, 15 Fed. Rep. 532.

Prior to the decision of this case the only authority directly in point was that approved and followed by Judge Morrow. See *Farmers' Loan & Trust Co.* v. *Oregon Pacific R. R. Co.*, 31 Oregon, 237, fully sustaining petitioner's contention.

The receiver is not the agent of the plaintiff in the litigation nor does the plaintiff have any control or authority over him. He is agent and executive officer of the court which takes possession of the property which is the subject of dispute, and controls and operates it for the use and benefit, not of either party to the controversy, but of whomsoever in the end may be concerned in its disposition. His acts and possession are the acts of the court and the parties to the litigation have no control over his actions nor any power to determine what liabilities he may incur.

The receiver's employés must look to the property in the court's hands and the income therefrom for the payment of their compensation. Their wages are not costs of the litigation in any sense, and, though incurred during the pendency of the

suit, they are not incurred in the suit. They are not expenses of either side of the controversy and are not costs or fees which can be charged against the successful party to the litigation. *Farmers' Loan & Trust Co.* v. *Oregon Pacific R. R. Co.*, 31 Oregon, 237. And see *Booth* v. *Clark*, 17 How. 322, 331; *Davis* v. *Gray*, 16 Wall. 203, 218; *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112.

This court has always maintained the position that a receiver is an agent of the court and derives no authority from the act of the parties at whose suggestion or by whose consent he is appointed. *Chicago Union Bank* v. *Kansas City Bank*, 136 U. S. 223, 236; *Quincy, Missouri & Pacific R. R. Co.* v. *Humphreys*, 145 U. S. 82, 97. The lower Federal courts have maintained the same doctrine. *Texas & St. Louis Ry. Co.* v. *Rust*, 17 Fed. Rep. 275, 282; *Central Trust Co.* v. *Wabash, St. Louis & Pacific Railway Co.*, 23 Fed. Rep. 863; *New York, P. & O Ry. Co.* v. *New York, L. E. & W. Ry. Co.*, 58 Fed. Rep. 268, 278.

The only pledge that the court made, or could lawfully make, was that the fund in court would be impressed with a paramount lien in favor of the receiver's creditors, and that it would enforce such lien against the property and parties as a condition of releasing the property. Taft, J., 58 Fed. Rep. 15. See also Beach on Receivers, § 416; *Meyer* v. *Johnson*, 53 Alabama, 237, 348, 349; *Turner* v. *Peoria &c.*, 95 Illinois, 134, 145; *Kneeland* v. *American Loan Co.*, 136 U. S. 89, 98.

Mr. Edgar C. Chapman, respondent, in person:

The Circuit Court has power to compel petitioner to pay the deficit of the receivership.

In railroad receiverships (and the case at bar is similar) it has been uniformly held that the courts have the power to decree reimbursement to the receiver out of the income of the property and if that is not sufficient then out of the *corpus*, before payment of the mortgage debt is allowed.

The theory upon which courts have thus proceeded is that

the court has pledged its faith to the payment of the expenses of the receivership. As the court has no property of its own with which to operate the railroads, it must, in order to keep faith with those whom it employs, redeem its pledge by either resorting to the fund brought into court or else to the party at whose instance and upon whose showing it was induced to undertake the management of the property. This power is inherent. It does not depend upon consent or arise from contract. Alderson on Receivers, § 332.

If a court has the power to redeem some of its pledges by resorting to the fund in its possession for that purpose, it has also the power to redeem all of its pledges by resorting to the party that induced it to appoint the receiver, assuming that such party is able to respond.

Property cannot be administered by the court and kept a "going concern," without expense.

The court must not knowingly order expenses to be incurred that it has no intention of seeing paid.

When the court places a receiver in charge of property on representations made to it by a complainant, with orders to contract such indebtedness as appears needful, it is to be presumed that reliance shall be placed upon the court for the payment of this indebtedness.

Ordinarily the fund is sufficient to protect the court and its officers and employés, and the court is not compelled to proceed further. And this is why there is a dearth of decisions on the precise question presented by the case at bar, namely, the power of the court to look beyond the property administered upon where it fails, or proves insufficient to the complainant to make up the deficiency.

That the court has this power in a proper case, and the case at bar is such an one, there is no doubt. See *Knickerbocker* v. *McKindley C. & M. Co.*, 67 Ill. App. 295; *Pacific Bank* v. *Madera Fruit Co.*, 124 California, 525; *Ephraim* v. *Pacific Bank*, 129 California, 589; also cases cited by Judge Ross in *Chapman* v. *Atlantic Trust Co.*, 119 Fed. Rep. 270. *Farmers' Loan*

& Trust Co. v. *Oregon Pacific R. R. Co.*, 31 Oregon, 237, discussed and distinguished.

MR. JUSTICE HARLAN delivered the opinion of the court.

The principal question in this case—now before us upon writ of certiorari for the review of a final order of the Circuit Court of Appeals for the Ninth Circuit—is stated by counsel to be this: Is a complainant, who has in good faith prosecuted a suit upon a good cause of action, and upon whose application the court has properly appointed a receiver, and who obtains a decree fully establishing his rights, nevertheless personally responsible for a deficiency caused by the failure of the property which is the subject of the suit to bring enough to cover the allowances made by the court to the receiver and his counsel, and the expenses which the receiver, without special request of the complainant in any instance, had incurred?

The Woodbridge Canal and Irrigation Company, a corporation of California, executed July 17, 1891, a mortgage conveying all its property and franchises to the Atlantic Trust Company, a New York corporation, in trust to secure certain bonds, with interest coupons attached, issued by the mortgagor company for the purpose of raising money to fully complete and equip its canal and headworks, and of paying its indebtedness then existing or to be subsequently incurred. The bonds were made payable with interest semi-annually at the office of the Trust Company in the city of New York.

In the event of default in the payment of semi-annual interest on the bonds for six months, or of any tax or assessment for the same period, the trustee and its successors were authorized, on the written request of the majority of the holders of the outstanding bonds, or, if the principal of the bonds shall be due, upon the request of the holders of outstanding bonds, to take actual possession of the mortgaged property, and by themselves or agents hold, use and enjoy

the same, and from time to time make repairs, replacements, alterations, additions and improvements as fully as the company might have done before such entry, and receive all tolls, income, rent, issues and profits arising from the property. The trustee and its successor or successors were authorized, on such default, to sell the mortgaged property at public auction, after at least two months' notice, and execute to the purchaser or purchasers a deed in fee simple, or otherwise, for all the right, title, interest and estate reversionary or in possession which they might be entitled to receive, have or hold of the company, such sale to be a complete bar against the company, its successors or assigns, and all persons claiming from or under it.

The mortgage made provision as to the disposal of moneys received from tolls, income, profits, etc., and provided that "nothing herein shall be construed as limiting the right of the trustee to apply to any competent court for a decree of foreclosure and sale under this indenture, or for the usual relief in such proceedings, and the said trustee, or its successor, may, in its discretion, so proceed."

The Canal and Irrigation Company, having made default in the payment of the principal and interest due on its bonds, its board of directors, by formal action, recognized their inability to meet its obligations, and requested the trustee to bring the present suit for the foreclosure of the mortgage, and enforce the payment of the principal and interest of the bonds. The bringing of the suit was also in conformity with the written request of the owners and holders of fifty-five of the outstanding bonds, who expressed their election and option that the principal of the bonds should forthwith become due and payable.

The bill filed by the Trust Company prayed: 1. That a receiver be appointed to take charge of the mortgaged property and to maintain and operate the canals pending the suit and until sale under a judgment of foreclosure. 2. That the court ascertain the number and amount of outstanding bonds, fix

the compensation of the receiver and his attorney, and that the plaintiff have judgment against the Canal and Irrigation Company, for the amount due for principal and interest on the bonds, and for attorney's fee, trustee's commissions, costs and expenses of the suit. 3. That the mortgaged property be sold at public auction, and that out of the proceeds the expenses of sale, costs of suit, trustee's commissions and counsel fees be paid, the balance to be applied in payment of outstanding bonds.

The court, on motion of the Trust Company, the Canal and Irrigation Company appearing and consenting thereunto, appointed E. C. Chapman receiver of the mortgaged property, with authority to take possession of it. The receiver was empowered by the order of court to continue the operation of the main and branch canals of the mortgagor company in the usual and ordinary way as the same were then operated, discharging, so far as practicable, contracts for water supplies entered into by the company, collecting rents, tolls, and moneys payable under water contracts, keeping the property in good condition and repair, employing needful agents and servants at such compensation as he deemed reasonable, paying for needful labor, supplies and materials as might seem to him to be necessary and proper in the exercise of a sound discretion, "with leave to apply to the court from time to time as he may be advised for instructions in the premises." "He shall," the order proceeded, "do whatever may be needful to preserve and maintain the corporate franchises of said defendant corporation and its rights to the use of the water and all its property, until final judgment in this action, and to defray the necessary and proper expenses incident thereto." The above order was made October 3, 1894.

In the progress of the cause the receiver, upon his own motion and not, so far as the record shows, by direction of the plaintiff, applied to the court and obtained its authority to borrow money and issue certificates, which were used by him in the operation of the property, paying debts, etc.

Certain parties were permitted to intervene and the litigation lingered until September 18, 1897, when a decree of foreclosure and sale was entered, nearly three years after the receiver was appointed. There was great difficulty in effecting a sale, partly because of the washing away of a dam. Finally, a bid of $21,000 by one Thompson, acting on behalf of the receiver and his attorneys, was accepted. That amount was just enough to cover the fees of the receiver and his counsel and the expenses of the sale and to make a small *pro rata* payment on the accrued interest on receiver's certificates. This left unpaid all other expenses and certificates of the receiver. The sale was confirmed August 15, 1898, and the commissioner was directed to deliver a deed for the property.

The order confirming the sale directed the clerk of the court to report the balance remaining unpaid on account of the fees of officers or appointees of the court, or of advances made by them, and on account of receiver's certificates, time checks or other expenses of the receiver's administration. The order also directed the receiver to render an account of his receipts, disbursements and expenses in the management and care of the property between the date of the decree of foreclosure and the date of the sale and transfer of possession.

The clerk made the required report, from which it appeared that the proceeds of sale, $21,000, were absorbed by these claims: Compensation of receiver, $9,000; receiver's attorneys, $9,000, and fees of commissioner, master, advertising, etc., $3,000. He further reported that of the amounts found due by the decree of foreclosure of September 18, 1897, there remained unpaid, on the following accounts, these sums: Receiver's certificates, $12,292.47; receiver, for advance made by him, care and management of property, $3,105.72; time checks issued by receiver, $5,728.89; work done for receiver, $2,269.85; expenses of operating canal system, $5,728.54; other sums, $13,723.49; total, $42,848.96.

On the third of August, 1899, nearly five years after the appointment of the receiver, he filed his final report and peti-

tion, in which he prayed that the balance due him on account of his receipts and disbursements after the making of the decree, also the balance due to his employés after the making of the report upon which the decree was based, and the compensation to be allowed to him and his counsel since the date of the decree, be fixed and established by the court, and judgment entered "*against the plaintiff* in this cause for the full amount of the deficiency hereinbefore stated, with the sums so allowed for services and expenses since the date of said decree, and that the proper process of court be issued for the collection thereof from plaintiff, and that when collected the same be paid into court to be by the court disbursed to the several persons entitled thereto."

The petition alleged that the Canal and Irrigation Company was insolvent and unable to respond to any judgment for deficiency that had been or might be entered in the cause. Upon this report and petition being filed the Circuit Court ordered the Trust Company to show cause why the amount due the receiver and his employés should not be settled and allowed, and why judgment for such deficiency should not, when ascertained, be entered against that company and it be required to pay the same into court.

The Trust Company appeared and demurred to the receiver's report and motion for judgment against it. The Circuit Court, after hearing, sustained the demurrer and discharged the rule to show cause. Upon appeal to the Circuit Court of Appeals the order of the Circuit Court was reversed, the former court being of opinion that the Trust Company was liable to a personal judgment for the alleged deficiency. *Chapman* v. *Atlantic Trust Co.*, 119 Fed. Rep. 257.

The grounds upon which the Circuit Court and the Circuit Court of Appeals, respectively, proceeded appear in the margin.[1]

[1] Circuit Court—Judge Morrow: "I am of the opinion that provisions should have been made when this suit was commenced, or at the time when the Receiver was appointed, for the payment of or security for the amount of his expenses, and for the redemption of whatever certificates might be

Upon the return of the case to the Circuit Court the Trust Company filed its answer to the receiver's petition, and the cause was submitted, by consent, as upon bill and answer, on

issued by him, in the event that the proceeds of the sale of the property should prove insufficient. But such provision was not made at the time by the court, and I am of the opinion that the court is without authority to do so now. In *Farmers' Loan Co.* v. *Oregon Pacific R. R. Co.*, 31 Oregon, 237, this question was fully considered, and the views there expressed are in accord with my opinion in the present case."

CIRCUIT COURT OF APPEALS—JUDGE ROSS, 119 Fed. Rep. 268: "Those who render services in and about the receivership are justly entitled to be paid the fair value of such services, and when the issuance of receiver's certificates becomes necessary for the proper preservation of the property, and such certificates are authorized by the court to be issued by the Receiver for money to be used for such purposes, those who buy the obligations are entitled to have them paid. How? In cases like the present, out of the property or its proceeds, certainly. No one, we apprehend, will question that. But the property having been sold for but a trifle more than the amount theretofore allowed the Receiver and his attorney for their services in and about the receivership, and they credited with such allowance on their bid, who is to suffer? The complainant, at whose instance the Receiver was appointed, or those who, relying upon his acts, based upon the authority and sanction of the court, invested their money and rendered their services in and about the operation and preservation of the property? It is not difficult to determine on which side of this question are the equities. With due deference we are unable to see any force in the suggestion of the Supreme Court of Oregon in the case cited that, as the complainant in such a suit has no control over the Receiver, if he be held liable for the expenses of the receivership, in the event the property prove insufficient to pay them, he may be bankrupted. At the same time it is conceded by that learned court that where it appears probable that the property will prove insufficient, the court may require, as a condition to the appointment of a receiver, a guaranty of the payment of the expenses of such officer, and a like guaranty subsequently, on pain of the discharge of the Receiver, when it becomes evident that the property will prove insufficient to pay the expenses. The theory of this manifestly is, that in these two instances the complainant can inform himself of the probable outcome of the property, and if he be not willing to give the guaranty he will not secure the appointment of a Receiver in the one instance, or his continuance in office in the other. But why should he not be required to inform himself, also, when no such condition is imposed by the court? Precisely the same opportunity on complainant's part, and precisely the same duty to inform himself in that respect, exists in the absence of the requirement of the guaranty mentioned. The complainant, whose lien upon the property it is sought to foreclose, in the nature of things, must and should be held to have much better information regarding the value

the issues joined by the receiver's final report and petition, and the answer of the Trust Company. In conformity with the opinion of the Circuit Court of Appeals the Circuit Court gave personal judgment against that company for $36,207.57, as the amount due the receiver. That judgment was affirmed by the Circuit Court of Appeals. *Atlantic Trust Co.* v. *Chapman*, 145 Fed. Rep. 820.

We are of opinion that the Court of Appeals erred in holding that the Trust Company was liable for the deficiency found to exist. No such liability could arise from the simple fact that it was on plaintiff's motion that a receiver was appointed to take charge of the property pending the litigation. The motion for a receiver was to the end that the property might be cared for and preserved for all who had or might have an interest in the proceeds of its sale. The circumstances seemed to have justified the motion, but whether a receiver should have been appointed or not was in the sound discretion of the court. Immediately upon such appointment and after the qualification of the receiver, the property passed into the custody of the law, and thenceforward its administration was wholly under the control of the court by its officer or creature, the receiver. In *Booth* v. *Clark*, 17 How. 322, 331, it was said: "A receiver is an indifferent person between parties, appointed by the court to receive the rents, issues or profits of land, or other thing in question in this court, pending the suit, where

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of the property and its probable outcome than the court. Indeed, it is not easy to see how the court can be properly expected to know anything about it. The appointment of a Receiver, if made at all, is usually made at the request of the complainant—occasionally, as in the case at bar, with the consent of the defendant. If the complainant was not willing to pay the expenses of the receivership it asked for, in the event of the insufficiency of the property to do so, it should not have asked the court to make the appointment, incur the liabilities, and pledge its faith to their payment. It was the duty of the complainant to keep informed in respect to the progress of the receivership, the property, and its probable outcome, and whenever it became unwilling to further stand good for any deficiency, to ask the court to bring to an end the business it undertook and was conducting on complainant's petition."

it does not seem reasonable to the court that either party should do it. Wyatt's Prac. Reg. 355. He is an officer of the court; his appointment is provisional. He is appointed in behalf of all parties, and not of the complainant or of the defendant only. He is appointed for the benefit of all parties who may establish rights in the cause. The money in his hands is in *custodia legis* for whoever can make out a title to it. *Delany* v. *Mansfield*, 1 Hogan, 234. It is the court itself which has the care of the property in dispute. The receiver is but the creature of the court; he has no powers except such as are conferred upon him by the order of his appointment and the course and practice of the court. *Verplanck* v. *Mercantile Insurance Company*, 2 Paige, C. R. 452." In *Porter* v. *Sabin*, 149 U. S. 473, 479, the court said: "When a court exercising jurisdiction in equity appoints a receiver of all the property of a corporation, the court assumes the administration of the estate; the possession of the receiver is the possession of the court; and the court itself holds and administers the estate, through the receiver as its officer, for the benefit of those whom the court shall ultimately adjudge to be entitled to it," citing *Wiswall* v. *Sampson*, 14 How. 52, 65; *Peal* v. *Phipps*, 14 How. 368, 374; *Booth* v. *Clark*, 17 How. 322, 331; *Union Bank* v. *Kansas City Bank*, 136 U. S. 223; *Thompson* v. *Phenix Ins. Co.*, 136 U. S. 287, 297. Ought the receiver, in this case, to have been authorized to burden the property with indebtedness on account of money borrowed or on account of certificates which should become a first lien? Ought some limit have been put on expenses of that kind? These were matters to be determined by the court in the light of all the circumstances. It was for the court to say whether the Canal and Irrigation Company should be kept on its feet by moneys borrowed or obtained, under its orders, by the receiver. The wishes of the parties could not control as to such matters. Indeed they need not in strictness have been consulted as to what should be done from time to time in the management of the property. If the situation was such as to render it uncertain or doubtful whether the property

would ultimately bring, at a sale, enough to meet the expense incurred in connection with its management, the court might well have declined to permit its receiver to issue certificates or to borrow any money on the property as security for its payment. So, if the condition and apparent prospects of the property made such a course proper, the court, in the exercise of a sound judicial discretion and looking to the interests of all who might be affected by its action, could, at the outset, have made it a condition of the appointment of a receiver that the plaintiff and those whom it represented should be liable for any deficiency in the funds required for the expenses of the receivership; or it might have made it a condition of any order authorizing receiver's certificates or the borrowing of money, that the plaintiff, or those whom it represented, should make good any deficiency that might be disclosed after applying the proceeds of the sale according to the rights of parties. Still further, the court—if it had been proper, under all the circumstances, to pursue such a course—could have refused to operate the canals in question at all and required the parties to proceed to a final decree of foreclosure and sale at the earliest practicable moment. But none of these things were done. Under the responsibility imposed upon it by law, the court determined to carry on the business of the Canal and Irrigation Company for a time; and, under the same responsibility, it authorized the receiver to borrow money, issue receiver's certificates, and incur expenses, without any security for indebtedness incurred in this way, except the property or the fund in the control of the court, and the good faith, discretion and care of the court in its administration. No other security seems to have been contemplated by the court or the receiver or any party to the cause. No hint or warning was given, in the progress of the cause, that the absent trustee was to be liable in the event that the property or fund under the control of the court proved insufficient to meet the expenses of the receivership. The Trust Company, it is true, invoked the jurisdiction of the court by bringing this suit for foreclosure and sale and

making a motion for the appointment of a receiver to hold and manage the property *pendente lite*. That, surely, the Trust Company had the right to do, but it did not thereby make itself ultimately liable for money borrowed and receiver's certificates issued by order of the court. The one person who was in a position to inform the court from time to time of the condition and probable value of the property, and of what was or what seemed to be necessary in order to preserve it for the parties interested in it, was its officer and representative, the receiver. It was at his instance and because of his report of the condition and needs of the property, that money was borrowed and certificates issued in order that expenses incurred in the administration of the property might be met. To hold the Trust Company liable for indebtedness thus created would be most inequitable, and would not, we think, be in accord with sound principle.

It is true that cases are cited in which the party bringing a suit, in which a receiver is appointed, has been held liable for expenses incurred by the receiver in excess of the proceeds arising from the sale of the property. But in most, if not in all, of those cases the circumstances were peculiar and were such as to make it right and equitable, in the opinion of the court, that that should be done. As, for instance, in *Ephraim* v. *Pacific Bank*, 129 California, 589, 592, in which arose a question as to the party to whom a receiver should look for reimbursement or payment of his expenses, the court recognized the fact that the general rule that the compensation of a receiver was a charge upon the fund in his hands did not apply without qualification to every case, and said: "If he [the receiver] has taken property into his custody under an irregular, unauthorized appointment, he must look for his compensation to the parties at whose instance he was appointed, and the same rule applies if the property of which he takes possession is determined to belong to persons who are not parties to the action, and is taken from his possession by paramount authority. As to such property his appointment as receiver was

unauthorized and conferred upon him no right to charge it with any expenses." In *Farmers' Nat. Bank* v. *Backus*, 74 Minnesota, 264, 267, the Supreme Court of Minnesota said: "The second proposition is that, a receiver being an officer of the court, subject to its control, and not to that of the party asking for his appointment, his fees and expenses are chargeable solely against the fund which comes into his hands as receiver. The parties to the action are not personally liable therefor, unless they have given a bond or other contract to pay them as a condition of the appointment or continuance of the receiver. This may be conceded to be correct as a general rule, but there are cases where the court will, if the fund in court be insufficient to give the receiver reasonable compensation and indemnity, require the parties at whose instance he is placed in possession of the property to pay him. *Johnson* v. *Garrett*, 23 Minnesota, 565; *Knickerbocker* v. *McKindley Co.*, 67 Ill. App. 293; High, Rec. § 796. The special facts of this case fully justify the order of the trial court. It is not a case where the party asking for the appointment of a receiver is required to pay the receiver's charges without having received any benefit from the receivership. It is a case where the benefits so received were more than five times as great as the amount required to be paid. . . . The order of the court requiring the appellant to pay the receiver is, in effect, the enforcement of the receiver's equitable right to be paid from a fund growing out of the receivership." In *Cutter* v. *Pollock*, 7 N. Dak. 631, 634, the Supreme Court of North Dakota, speaking by its chief justice said: "We do not believe that any case can be found to uphold the palpably unjust rule that one who is shown to have had no right to maintain the action, and no interest whatever in the property which he claims, can require that the defendant, who has paid out of his own pocket the expenses of a receivership, shall not call upon him (the plaintiff in the action) for reimbursement." See High on Receivers (3d ed.), § 796; Beach on Receivers, § 774.

The above cases relied upon in the Circuit Court of Appeals—

and others of like kind could be cited—proceeded upon their special facts. They do not, in our judgment, authorize the order made by that court, although they tend to support the rule that cases *may* arise in which, because of their special circumstances, it is equitable to require the parties, at whose instance a receiver of property was appointed, to meet the expenses of the receivership, when the fund in court is ascertained to be insufficient for that purpose. Here, it is not asserted that the plaintiff trustee was not in the exercise of his strict rights when bringing a suit for foreclosure and sale and asking that the property be put in possession of a receiver. It gave no assurances as to the probable value of the property or of the profits to arise from its management. It misled no one who loaned money to the receiver, or who purchased the certificates. It acted as an ordinary litigant, submitting to the action of the court in all particulars. We do not think that the mere insufficiency of the property or fund to meet the expenses of a receivership entitled the receiver to hold the plaintiff in the suit personally liable, if all that could be said was that he instituted the suit and moved for the appointment of the receiver to take charge of the property and maintain and operate it pending the suit. A receiver, as soon as he is appointed and qualifies, comes, as we have said, under the sole direction of the court. The contracts he makes or the engagements into which he enters, from time to time, under the order of the court, are, in a substantial sense, the contracts and engagements of the court. The liabilities which he incurs are liabilities chargeable upon the property under the control and in the possession of the court and not liabilities of the parties. They have no authority over him and cannot control his acts.

When neither the order appointing a receiver nor the order authorizing him to borrow money and issue certificates was conditioned upon the plaintiff (in a suit for foreclosure and sale) being liable for the expenses of the receivership, and when no special circumstances appear which, upon equitable principles, would authorize the court to fix liability upon the plain-

tiff for such expenses, the general rule should be applied which makes such expenses a charge upon the property or fund under the control of the court, without any personal liability therefor upon the part of the plaintiff who invoked the jurisdiction of the court. The mere inadequacy of the property or fund to meet such expenses constitutes in itself no reason why liability should be fastened upon the plaintiff, who has been guilty of no irregularity, and who, so far from seeking any improper advantage, has succeeded in his suit by obtaining the relief asked, namely, a decree of foreclosure and sale.

The considerations which, in our judgment, should control in cases like this are well stated by the Supreme Court of Oregon in the above case of *Farmers' Loan Co.* v. *Oregon Pacific R. R. Co.*, 31 Oregon, 237. That, it is true, was the case of a railroad receivership, but what is said is equally applicable to other *quasi*-public corporations having public duties to perform, as in the case of water and irrigation companies. The particular question in that case was whether the plaintiff in a suit brought to foreclose a railroad mortgage could be held liable for the wages of employés of the receiver, who had no funds with which to pay them, having exhausted his power to float receiver's certificates. After observing that the plaintiff, at whose instance a receiver is appointed thereby consents to the absolute control and management of the mortgaged property by the court and its agents and to the priority of claims for the expenses incurred in its operation and management, and after declaring that it was not perceived upon what ground it could be claimed that, because the expenses of the receivership were allowed without any fault of his to exceed the value of the mortgaged property, thus entirely destroying his security, he must, in addition to the loss of his debt, be compelled to make good the deficit, unless the order of appointment was made upon that condition, the court in that case proceeded to say (p. 247): that the plaintiff "has no control over the acts of the receiver, and if, without his consent, he is to be held responsible therefor, he is liable to absolute bankruptcy and ruin. Such a

rule would render the plaintiff's position so uncertain and precarious as practically to preclude him from any protection whatever through the appointment of a receiver pending the foreclosure suit. But the inquiry is made, 'shall not a railroad mortgagee who applies for and obtains the appointment of a receiver, with authority to operate the road, be held responsible for the liabilities incurred by such officer when they cannot be made out of the property itself?' We think not, unless such responsibility was imposed as a condition to the appointment or the continuance of the receiver in office. The appointment of a receiver in a suit to foreclose a railroad mortgage is not a matter of strict right, but rests in the sound judicial discretion of the court; and it may, as a condition to issuing the necessary order, impose such terms as may, under the circumstances of the particular case, appear to be reasonable, and, if not acceded to, may refuse to make the order. 30 Am. L. Rev. 161; *Fosdick* v. *Schall*, 99 U. S. 235. If, therefore, upon an application for the appointment of a railroad receiver, it appears probable that the income and corpus will prove insufficient to pay the expenses and liabilities thereof, we have no doubt that the court may require of the plaintiff, as a condition to such appointment, a guaranty of the payment of the expenses of such officer. And if, at any time after the appointment has been made, it become apparent to the court that it will be unable to pay and discharge the present or future liabilities incurred by its executive officer and manager, it should refuse to continue the operation of the road under the receiver, unless its expenses are guaranteed. No court is bound or ought to engage or continue in the operation of a railroad or any other enterprise without the ability to promptly discharge its obligations, and, unless it can do so, it should keep out or immediately go out of the business. But, unless such terms are imposed as a condition of the appointment or continuation in office of the receiver, his employés must look to the property in the custody of the court and its income for their compensation. They have no claim whatever on any of the parties to the litigation. They

are the employés and servants of the court, and not of the parties. Their wages are in no sense costs of the litigation; and, although incurred during the progress of the suit, they are not incurred in the suit. They are neither expenses of the plaintiff, nor of the defendant, and are not fees or costs which can be charged against the successful party to the litigation, as is sought to be done in this case."

Without further elaboration, or further citation of authorities, we adjudge that the final orders of the Circuit Court and of the Circuit Court of Appeals, whereby the Trust Company was held liable to make good the deficiency found to exist in the funds required for the expenses of the receivership, were erroneous. Those orders must be set aside, and the petition of the receiver, so far as it seeks to impose such liability on the plaintiff, must be dismissed. To that end the decree is reversed and the cause remanded for such proceedings as will be consistent with this opinion and be in conformity with law.

Reversed.

MR. JUSTICE MCKENNA did not sit in this case.